

1990

Gene Brice, Willis Hall, Joseph R. May, Douglas Quayle, J. Rolfe Tuddenham, and Gordon Zilles v. Cache Valley Dairy Association, Intermountain Milk Producers Association, Vernon Bankhead, Randall Bradshaw, Don C. Nye, Frank P. Olsen, Wiflord B. Meek, Lathair Peterson, Rulon King, Larry Pitcher, Lynn Mickel, Robert Haworth, Jeff Hyde, Evan Skinner, Robert Jackson, and William Lindley, Randon Wilson, John Does 1-30, Sam Soes 1-10: Petition for Writ of Certiorari

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Utah Supreme Court  
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Roger P. Christensen; Jan P. Mahlberg; James C. Jenkins; R. Brent Stephens; Robert H. Henderson; J. anthony Eyre; M. David Eckersley Attorneys for Appellants.  
N. George Daines; Kevin E. Kane; Attorneys for Appellants.

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#### Recommended Citation

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DOCKET NO. **900032**

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS  
QUAYLE, J. ROLFE TUDDENHAM,  
and GORDON ZILLES, on behalf  
of themselves, for the benefit  
of Cache Valley Dairy  
Association and for all  
members and/or Holders of  
Certificates of Interest in  
Cache Valley Dairy  
Association,

Plaintiffs and Appellants,

vs.

CACHE VALLEY DAIRY  
ASSOCIATION, a Utah  
agricultural cooperative,  
INTERMOUNTAIN MILK PRODUCERS  
ASSOCIATION; a Utah  
Agricultural Cooperative;  
VERNON BANKHEAD; RANDALL  
BRADSHAW; DON C. NYE; FRANK  
P. OLSEN; WIFLORD B. MEEK;  
LATHAIR PETERSON; RULON KING;  
LARRY PITCHER; LYNN MICKEL;  
ROBERT HAWORTH; JEFF HYDE;  
EVAN SKINNER; ROBERT JACKSON;  
and WILLIAM LINDLEY;  
RANDON WILSON; JOHN  
DOES 1-30; SAM SOES 1-10,

Defendants and Respondents.

PETITION FOR WRIT  
OF  
CERTIORARI

Docket No. **900032**

APPENDIX TO BRIEF FOR PETITION FOR WRIT OF CERTIORARI

FILED

JAN 30 1990

Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS  
QUAYLE, J. ROLFE TUDDENHAM,  
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## APPENDIX

- Appendix A: Utah Court of Appeals Opinion (Not for Publication)
- Appendix B: Memorandum Decision  
T.R. at 552-554.
- Appendix C: Title 3, U.C.A. 1953.
- Appendix D: Notice  
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- Appendix E: Letter of Intent  
T.R. at 328-333.
- Appendix F: IMPA Resolution of December 19, 1985.
- Appendix G: Verified Complaint  
T.R. at 1-26.
- Appendix H: Plaintiffs' Statement of Undisputed Facts.
- Appendix I: Interchange of Fact, Combination of Plaintiffs' and  
Defendants' Statements of Fact.  
T.R. at 52-54, 140-151, 197-199, 227-238.

## APPENDIX A

COVER SHEET

CASE TITLE:

Gene Brice, Willis Hall, Joseph R. May,  
Douglas Quayle, Theodore Roper, J. Rolfe  
Tuddenham, and Gordon Zilles, on behalf  
of themselves, for the benefit of Cache  
Valley Dairy Association, and for all  
members and/or Holders of Certificates  
of Interest in Cache Valley Dairy  
Association,

Plaintiffs and Appellants,

v.

Case No. 890289-CA

Cache Valley Dairy Association, a Utah  
agricultural cooperative; Intermountain  
Milk Producers Association; a Utah  
agricultural cooperative; Vernon Bankhead;  
Randall Bradshaw; Don C. Nye; Frank P.  
Olsen; Wilford B. Meek; LaThair Peterson;  
Rulon King; Larry Pitcher; Lynn Mieckle;  
Robert Haworth; Jeff Hyde; Evan Skinner;  
Robert Jackson; William Lindley; Randon  
Wilson; John Does 1-30; and Sam Soes 1-10,

Defendants and Respondents.

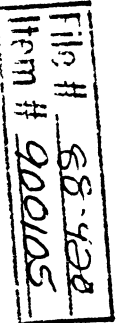
PARTIES:

N. George Daines (Argued)  
Kevin E. Kane (Argued)  
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Roger P. Christensen (Argued)  
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Salt Lake City, UT 84145



J. Anthony Eyre (Argued)  
Kipp & Christian  
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M. David Eckersley  
Prince, Yeates & Geldzahler  
Attorney for Cache Valley Dairy Association  
175 East 400 South, Suite 900  
Salt Lake City, UT 84111

TRIAL JUDGE:

Honorable VeNoy Christoffersen

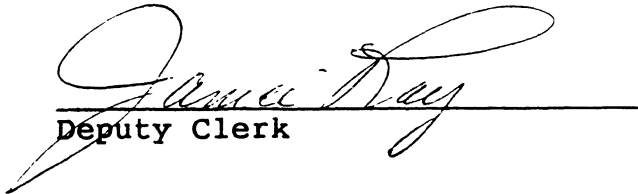
December 11, 1989. OPINION (Not For Publication)

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed in part, and reversed in part, and remanded for further proceedings in accordance with the views expressed in the opinion filed herein. The parties are to bear their own costs on appeal.

Opinion of the Court by NORMAN H. JACKSON, Judge; J. ROBERT BULLOCK, sitting by special assignment, concurs. GREGORY K. ORME, Judge, concurs by separate opinion.

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of December, 1989, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

  
Deputy Clerk

TRIAL COURT:

Cache County Court, First District Court No. 25514

IN THE UTAH COURT OF APPEALS

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FILED

DEC 11 1969

*Shelby J. ...*

Gene Brice, Willis Hall, )  
Joseph R. May, Douglas Quayle, )  
Thedford Roper, J. Rolfe )  
Tuddenham, and Gordon Zilles, )  
on behalf of themselves, for )  
the benefit of Cache Valley )  
Dairy Association, and for all )  
members and/or Holders of )  
Certificates of Interest in )  
Cache Valley Dairy )  
Association, )

Plaintiffs and Appellants, )

v. )

Cache Valley Dairy Association, )  
a Utah agricultural cooperative; )  
Intermountain Milk Producers )  
Association; a Utah )  
agricultural cooperative; )  
Vernon Bankhead; Randall )  
Bradshaw; Don C. Nye; Frank P. )  
Olsen; Wilford B. Meek; )  
LaThair Peterson; Rulon King; )  
Larry Pitcher; Lynn Mieckle; )  
Robert Haworth; Jeff Hyde; )  
Evan Skinner; Robert Jackson; )  
William Lindley; Randon Wilson; )  
John Does 1-30; and Sam Soes )  
1-10, )

Defendants and Respondents. )

OPINION  
(Not For Publication)

Case No. 890289-CA

First District, Cache County  
The Honorable VeNoy Christoffersen

Attorneys: N. George Daines and Kevin E. Kane, Logan, for  
Appellants  
Roger P. Christensen and Jan P. Mahlmberg, Salt  
Lake City, for Respondent Intermountain Milk  
Producers Association  
R. Brent Stephens and Robert H. Henderson, Salt  
Lake City, for Respondent Randon Wilson  
J. Anthony Eyre, Salt Lake City, for Respondent  
Cache Valley Dairy Association Directors  
M. David Eckersley, Salt Lake City, for Respondent  
Cache Valley Dairy Association

Before Judges Jackson, Orme, and Bullock.<sup>1</sup>

JACKSON, Judge:

Appellants, who were members and directors of Cache Valley Dairy Association (CVDA), an agricultural cooperative, appeal from a summary judgment in favor of all defendants on all their claims. We affirm in part, reverse in part, and remand.

CVDA is a nonprofit corporation first organized in 1935. Its principal business was to promote and facilitate production, distribution, and sale of members' dairy products and by-products. To accomplish its purposes, CVDA's articles of incorporation provided that it could "acquire, own, operate, mortgage, control, hypothecate, sell and transfer any and all kinds of real and personal property necessary to be used in the carrying on of said business." The association acted as agent for its members in handling and dealing with their dairy products. This agency relationship was created by the execution of a marketing agreement between CVDA and each member as an active milk producer. To become a member, a milk producer had to sign an "Association Marketing Contract." Termination of any producer's marketing contract terminated membership. When a member ceased to be an active milk producer, his eligibility for membership in CVDA ended.

Like other dairy cooperatives, CVDA raised working capital by retaining part of the proceeds left from the sale of members' milk products after payment of expenses. This process created equity interests, called "producer equities," in members of the cooperative based on each member's share of the capital contribution. When a producer became inactive, membership in CVDA ceased, but he retained his equity interests. Producer equities were retired by CVDA on a ten-year rotation cycle as working capital was replenished from current revenues from the sale of active members' milk products.

CVDA's Board of Directors consisted of twenty-one elected members. According to the complaint, the six individual appellants were duly qualified and acting members of

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1. J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp. 1989).

the CVDA Board of Directors, as well as producer members and holders of producer equities worth more than \$50, at all material times. The CVDA Board took the following action on June 27, 1984, with all board members present:

Manager Rick handed out to the Board a letter of intent that would give the management the go ahead to put together the [Intermountain Milk Producers Association]. It was necessary to have Board approval for the President to sign the letter of intent. Lynn Mieckle made a motion that we accept the letter of intent with Rulon King seconding and motion carried.

Elections of the Directors to represent Cache Valley Dairy Association as Directors of the new IMPA Board are Frank Olsen, Larry Pitcher, LaThair Peterson, Vernon Bankhead, Lynn Mieckle, Douglas Quayle and Wilford Meek, with William Lindley being appointed Vice-chairman of the committee.

The letter of intent approved by the CVDA Board was signed by its President, William Lindley, following that Board meeting. The document recites that the four parties (CVDA, Western General Dairies, Inc., Star Valley Producers, Inc., and Lake Mead Cooperative Association), "after considerable discussion and negotiations," determined to form a marketing agency to be called Intermountain Milk Producers Association (IMPA), a Utah agricultural cooperative. The IMPA Board was to consist of eighteen directors, including those elected by and from the CVDA Board. The letter of intent provided for the immediate formation of IMPA and commencement of its management operations by August 1, 1984, with the ultimate goal of consolidating all operations into IMPA. The letter of intent described how the four parties would implement their plan and achieve their objective, then stated in Paragraph 19:

At the time the consolidation is accomplished, all members of the parties will terminate their membership in the parties and will be given membership in IMPA. All remaining assets of the Parties will be transferred to IMPA at book value and all remaining debts will be assumed by

IMPA. All employees will be transferred to IMPA, subject to any labor contracts which may then exist. Producer equities held by the Parties will be assumed by IMPA and will be rotated on a uniform basis.

The CVDA Board met on November 27, 1985, with only one member, respondent Robert Jackson, absent. The minutes compiled by appellant Gordon Zilles, as secretary, show the following action taken: "A meeting to merge the coop [sic] together was discussed. On a motion by the Board, they voted 20 for and 1 voted against. Meeting adjourned."

Pursuant to this authorization, the CVDA Board mailed notice of a special meeting of members to be held December 16, 1985. According to the notice, the principal purpose of the meeting was to "consider and vote upon the Plan of Merger (Consolidation)" of the four cooperatives. Passage of the plan was said to require only a simple majority of the members present and voting at the special meeting. The notice was sent to active producer members only, not to those who were inactive producers holding equity certificates.

The "Summary of Plan of Merger (Consolidation)" accompanying the notice stated that the four co-ops "propose to consolidate their assets into IMPA." The main paragraph of the plan summary stated:

The terms and conditions are: 1) the Consolidating Cooperatives will transfer to IMPA all of their assets at book value in exchange for the promise by IMPA to assume all liabilities of said cooperatives; b) All membership agreements held by said cooperatives shall be assigned to and assumed by IMPA in accordance with their terms; c) all milk base held by members shall become milk base of IMPA on a pound-for-pound basis subject to the same rules, regulations and agreements in effect on the day the plan is adopted; d) all equities of IMPA held by members of said cooperatives shall become equities of IMPA on a dollar-for-dollar basis subject to existing rules, regulations and

agreements; f) all agreements, contracts, claims and obligations whatsoever of said cooperatives shall be assumed by IMPA as though originally held by IMPA; g) All employees employed by said cooperatives as of the date of approval of the plan shall become employees of IMPA and all retirement plans, vacation accruals or other employee benefits shall be assumed by IMPA; and h) all other provisions of the Agreement of Merger (Consolidation).

Paragraph 6 of the plan summary provided that the officers of the consolidating cooperatives were to execute the documents necessary to carry out the plan.

The provisions for merger of agricultural cooperatives set forth in Utah Code Ann. §§ 3-1-30 to -41 (1988), a part of the ~~Uniform Agricultural Cooperative Association Act~~ added in 1965, were admittedly not followed. Among other things, the statute mandates proxy voting at the special membership meeting to approve a plan of merger. Utah Code Ann. § 3-1-34 (1988). It also grants membership status, for purposes of notice and voting on a plan of merger and dissenting rights, to holders of "certificates of interest, patronage refund certificates or other interest by whatever name designated" exceeding \$50 in value, even if those holders are not otherwise designated as members by the cooperative's articles of incorporation. Utah Code Ann. § 3-1-33 (1988).

Of the 146 CVDA members present at the special meeting held on December 16, 1985, 103 voted in favor of a plan to combine their cooperative with the others. Each member was allowed to cast one vote, and no proxy voting was permitted. Nonmembers holding producer equities were neither notified of the special meeting nor allowed to vote.

Thereafter, the respective CVDA and IMPA Boards and officers completed their combination on the terms and conditions above. The assets of CVDA were transferred to IMPA in February 1986. The transfer documents were signed by two officers of CVDA, respondent William Lindley as President and appellant Gordon Zilles as Secretary. The combination of the four cooperatives pursuant to the letter of intent was complete by August 1986. Each of the four cooperatives had transferred all their assets to IMPA, and IMPA had assumed all of their liabilities. In March 1986, IMPA had redeemed \$1,173,989 of

CVDA producer equities, reducing outstanding CVDA producer equities by twenty percent and placing the unredeemed producer equities on the same repayment rotation schedule as that used in the other three combined cooperatives. IMPA had used the assets received from the four combined cooperatives as collateral to establish an \$18,000,000 line of credit with the Sacramento Bank for Cooperatives. Consolidated financial statements and joint tax returns were filed for the fiscal years ending July 31, 1985, and July 31, 1986. Approximately eighty-two IMPA producers, who had been active members of CVDA until the cooperatives combined operations, converted from Grade B milk base status to Grade A, and they were consequently receiving payments for their milk at a higher rate. Each member of IMPA, including those from CVDA, who converted milk base from Grade B to Grade A had expended funds to upgrade their facilities in order to qualify. Numerous other significant changes in operations had occurred, including changes in the system for collection and transport of milk, reassignment of employees, insurance and workers' compensation coverage changes, capital purchases, construction of new facilities, and termination of CVDA profit-sharing and pension plans.

Some time after August 1986, several directors of CVDA expressed concern about the manner and method in which the combination of CVDA into IMPA had been carried out. Seventeen CVDA Board members and various attorneys met on December 17, 1986, to discuss what had happened. The following action, which appears in appellant Zilles's minutes, concluded that Board meeting:

After everyone had left, except Board members, Lynn Mieckle made a motion that we have IMPA indemnify our action as Board members of Cache Valley Dairy Association. That after this is done, we go home and milk cows. LaThair Peterson seconded. A vote was taken with 12 for and 4 against. Gene Brice refrained from voting. Those voting against were Rolfe Tuddenham, Willis Hall, Joe May and Douglas Quayle. Meeting adjourned.

The record does not indicate any follow-up action on the indemnification motion.

The appellants filed this lawsuit two months later, on February 18, 1987, alleging five causes of action. In the first, labeled "illegal merger," appellants claimed that CVDA

and IMPA failed to follow legal procedures for merger; therefore, the purported merger was null and void. The substance of the allegations is that the two agricultural cooperatives merged without affording specific notice, voting, and dissenting rights mandated by the merger provisions in the Agricultural Cooperative Associations Statute, Utah Code Ann. §§ 3-1-30 to -41. The relief sought in this claim was rescission of the merger itself and all transactions by which it had been accomplished, by return of CVDA's assets to it or payment by defendants of "damages" in excess of \$55,000,000, the amount by which CVDA's assets had allegedly been "diluted and dissipated" as a result of the illegal merger and subsequent activities.<sup>2</sup>

The second cause of action, labeled "Shareholders' Derivative Action," added allegations to support appellants' request for certification of the suit as a shareholders' derivative action pursuant to Rule 23.1 of the Utah Rules of Civil Procedure. Appellants alleged facts about the CVDA Board's unwillingness to assert CVDA's unspecified "rights" to "protect its property and business" against IMPA and the defendant CVDA Board members. The third cause of action, captioned "Negligence," was directed at the activities of counsel who advised the two co-ops and supervised the transactions by which they combined. The claim, brought by appellants as directors and as class representatives and on behalf of CVDA, alleged that attorney Randon Wilson failed to exercise due diligence and care and violated his "duty of trust, loyalty and confidentiality to CVDA and its Directors and Officers." The fourth cause of action, also brought by appellants as directors and class representatives and on behalf of CVDA, was labeled "Directors' Negligence." Appellants alleged that the other CVDA directors were negligent in not knowing and following the statutory requirements for merger found in sections 3-1-30 to -41, and that their breach of their duty of due care proximately resulted in more than \$55,000,000 in damages to CVDA. The relief requested under the second, third, and fourth causes of action was the same as that

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2. Although appellants contend that their first cause of action sets forth their individual claims for damages resulting from the "illegal merger," they have advanced no theory or legal authority to support any such individual claims for damages caused by the "dissipation and dilution" of CVDA's assets.

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requested under the first cause of action.

The fifth cause of action, captioned "Rescission," was asserted against defendants Sam Soe 1-10 who "subsequent to the purported merger of CVDA into IMPA took title to property of CVDA from IMPA or have taken liens, mortgages, encumbrances or secured interests in the property of CVDA." Appellants alleged that these transfers were null and void because IMPA had no authority to alienate the property of CVDA. They asked the court to restore the property to CVDA by ordering these defendants to "release, relinquish and reconvey any and all secured interest, liens or property received from IMPA."

Several motions, including those for summary judgment and dismissal, were presented and argued to the trial court. The parties submitted "interchanges" of facts in which some facts were not fully agreed upon, but the material facts on which the trial court based its judgment were not disputed. Appellants moved for partial summary judgment seeking a declaration that there was no valid merger and that the asset transfers were null and void. They also requested an injunction requiring the CVDA Board of Directors to resume control of CVDA's assets and personnel pending new elections.

In response, defendants conceded that sections 3-1-30 to -41 had not been complied with before CVDA's assets were transferred to IMPA in exchange for IMPA's assumption of CVDA's obligations, but contended that the statute did not apply to combinations brought about by transfers of assets. They also filed a joint motion for summary judgment, alternatively based on the nonexclusivity of the statutory merger provisions, federal pre-emption, and the equitable doctrines of waiver and laches.

The trial court agreed that, even if the statutory merger provisions applied to the combination of the four cooperatives in this case, the claims asserted by appellants individually and on behalf of CVDA for rescission of the merger and return of its assets were barred by laches. According to its memorandum decision, the trial court reached this conclusion because rights of the other cooperatives and third parties had intervened over the course of the gradual combination of the cooperatives. These parties had changed their positions in reliance on the apparent acquiescence by CVDA and its members during and after the combination process. Although the written decision shows the court's reasoning leading to judgment in

favor of respondents on appellants' first, second, and fifth causes of action, it does not reveal any basis for the court's apparent award of judgment on the two negligence claims against CVDA's attorney and directors.<sup>3</sup>

X { With this in mind, we first consider whether, on the undisputed facts before it, the trial court correctly determined that respondents were entitled to judgment as a matter of law on appellants' first, second, and fifth causes of action for rescission because of laches. See, e.g., D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989).

For purposes of analysis, we will assume that the merger provisions found in sections 3-1-30 to -41 applied to the transaction by which CVDA's operations, assets, and liabilities were taken over by IMPA, even though respondents characterize the transaction as something other than a merger. We interpret sections 3-1-30 to -41 as creating individual rights in the members of an agricultural cooperative to enforce the mandated procedures and member vote requirements for accomplishing a merger.<sup>4</sup> See Pitts v. Halifax Country Club, Inc., 19 Mass.

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3. Appellants are responsible for much of the confusion in the court's disposition of this case. Their causes of action and claims for relief were inadequately thought through and poorly pleaded. They seemed oblivious to the difference between a claim for damages and rescission as a form of equitable relief for a successful plaintiff, which may involve return to the status quo or the monetary equivalent of rescission if return to the status quo is impractical. See note 2, supra. Appellants also seemed unaware of the difference between their individual claims under the statutory merger provisions as CVDA members, for which they apparently sought certification of a class consisting of all members and equity holders, and the claims for injury to CVDA, which belonged only to CVDA and which could properly be brought as a derivative action, not as a class action. See Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980); see also 12B Fletcher Cyc. Corp. § 5908 (1984). "A class action and a derivative action rest upon fundamentally different principles of substantive law; to ignore those differences is not a minor procedural solecism." Richardson, 614 P.2d at 638.

4. Besides enforcement of the merger provisions in the Agricultural Cooperative Association Act as they relate to requirements for prior member approval of a merger plan, the

App. 525, 476 N.E.2d 222 (1985); see also U-Beva Mines v. Toledo Mining Co., 24 Utah 2d 351, 471 P.2d 867, 869 (1970) (interpreting statute requiring stockholder approval of sale of all corporate assets). That enforcement could take the form of an action in equity to enjoin any action to effectuate a planned merger or to set aside a merger not carried out with the approval required by the statute.

In their first cause of action, appellants apparently were trying to assert their individual rights to enforce the voting provisions in the statute. Each other cause of action pleaded is derivative in nature, alleging injury to, or asserting a right purportedly belonging to CVDA itself. See Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980).

The crux of appellants' allegations is that, because of noncompliance with sections 3-1-30 to -41, the merger/consolidation transaction and all transfers of assets implementing it (including all legal documents utilized to transfer assets, assume liabilities, and proceed with the operation of the new cooperative, IMPA) are "illegal" and "null and void." Appellants err in their conclusion that the implementing acts performed by CVDA and the ultimate result, i.e., merger, are null and void. In Pitts, 476 N.E.2d at 227, a shareholder of the merged surviving corporation brought an action seeking to rescind the merger with two other corporations or to exercise statutory appraisal and payment rights for his shares. The court stated he was not on sound ground concerning the failure to comply with statutory merger requirements, because noncompliance "does not void the merger per se, but instead makes it voidable at the insistence of a shareholder who for any reason objects to the merger and is not by his actions estopped from voicing his objection thereto."

{ We conclude that noncompliance with the merger provisions in sections 3-1-30 to -35 does not void the merger per se, but renders the merger voidable by objecting members. However, such members, like shareholders in corporations, are subject to equitable defenses when they seek to set aside an

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(footnote 4, continued)  
statute provides "dissenting members" a single remedy, i.e., payment by the surviving cooperative "of the fair value of the interest of such member," Utah Code Ann. § 3-1-40 (1988), which appellants did not seek.

accomplished merger because of noncompliance with sections 3-1-30 et seq.:<sup>5</sup>

If a stockholder, with knowledge of wrongful acts on the part of the directors or a majority of the stockholders, stands by for an unreasonable time without taking any steps to set the acts aside or otherwise interfere, and rights are acquired by others, his right to sue is barred by his laches, however clear his right to relief would have been if he had moved promptly.

X

12B Fletcher Cyc. Corp. § 5874 (1984) (footnote omitted). In the more specific context of an action seeking relief from a consolidation or merger, Fletcher asserts that a stockholder

must act with reasonable dispatch in view of all the circumstances of the case. Unexcused delay may bar his right to relief, particularly where the rights of innocent third persons have intervened.

. . . [S]tockholders may be barred by laches, in a proper case, from attacking the consolidation where they had either actual notice of the consolidation or notice of facts sufficient to put them on notice . . . .

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5.

It is immaterial whether the transaction assailed is void or voidable. If the complainant has been guilty of laches, a court of equity will not look into the transaction at all. It requires conscience, good faith and reasonable diligence. These wanting, the court will remain passive and leave the parties where it finds them.

Ruthrauff v. Silver King W. Mining & Milling Co., 95 Utah 279, 80 P.2d 338, 347 (1938); see Peck v. Monson, 652 P.2d 1325, 1328 (Utah 1982) (Oaks, J., concurring) ("equity only aids the vigilant, and will deny relief to a litigant who sleeps on his rights").

15 Fletcher Cyc. Corp. § 7161 (1979) (footnotes omitted); accord Federal Home Loan Bank Board v. Elliott, 386 F.2d 42 (9th Cir. 1967) (stockholder action to set aside merger barred by laches), cert. denied, 390 U.S. 1011 (1967). As formulated by the Utah Supreme Court, the doctrine of laches is appropriately applied where there is (1) unreasonable delay by a plaintiff in seeking an available remedy, and (2) prejudice to the defendant resulting from that delay. Borland v. Chandler, 733 P.2d 144, 147 (Utah 1987). That prejudice could result from a transfer of title to property or the intervention of third party rights. Mawhinney v. Jensen, 120 Utah 142, 232 P.2d 769, 773 (1951).

We now examine each element of laches in relation to the appellants. First, did they unreasonably delay in seeking rescission of the merger based on noncompliance with sections 3-1-30 to -41? The appellants served as directors of CVDA at all material times. Each voted to enter into the letter of intent to merge knowing three existing cooperatives and one new cooperative would, as a result thereof, proceed faithfully through the merger process, relying on them and CVDA to do likewise. That letter of intent described what they wanted to accomplish (merger or consolidation) and how they would do it.

Later, after the merger process had been underway for about eighteen months, the appellant directors voted to seek member approval of their prior plan, with one unidentified director dissenting. Each of the appellant directors, as a producer member, received notice of a special meeting of members to approve the merger/consolidation plan which they had adopted. Again, the notice stated what was to be accomplished and what the end result would be, i.e., merger/consolidation. The record does not verify whether each of the appellants attended the special meeting of members and, if so, how they voted as members. Even so, as directors they were charged with sufficient knowledge that the vote was 103 for and 43 against the plan and that the events and actions they had set in motion were rolling forward to the ultimate goal of merger or consolidation or combination that would include the transfer of CDVA's assets to IMPA, which took place in February 1986.

The appellants, as members and directors, knew that a merger/consolidation had been initiated. They launched it in their Board meeting on June 27, 1984. They reaffirmed it in their Board meeting November 27, 1985, when they acted to call a special meeting of members to approve their plan. They knew that a large majority of the members present at the special

meeting on December 16, 1985, voted to approve a merger, consolidation or transfer of assets and liabilities. They knew or should have known that their officers were proceeding to effectuate the combination when appropriate documents were executed and delivered in February 1986. Nonetheless, they did not take any action to set aside the combination of the cooperatives into IMPA between December 16, 1985, and February 1986. They failed to do anything until some time after the merger was complete on August 1, 1986. At the December 17, 1986, CVDA Board meeting, the only affirmative action proposed was to seek indemnification from IMPA. The minutes are devoid of any proposal by appellants or anyone else to rescind or set aside the combination. Instead, appellants waited until six months after the merger/consolidation was complete to commence these proceedings challenging the validity of the merger. We conclude that their delay, under the circumstances, was unreasonable.

Second, were the defendants prejudiced by the delay?

The record conclusively shows that CVDA and IMPA changed their positions during the delay period and that myriad rights of numerous third parties intervened in that interim. CVDA transferred its assets in exchange for IMPA's assumption of its liabilities. The third parties affected include the other three consolidating cooperatives and their members, the members of IMPA and its creditors, customers and employees, all of whom substantially changed their legal status in reliance upon the actions taken by CVDA to participate in and accomplish the merger. They were not in a position to know whether CVDA was jumping through each and every procedural hoop within the confines of its cooperative organization. These persons had every right to believe that CVDA had complied with every legal requirement for completion of the merger and to rely upon that belief in changing their positions with respect to both CVDA and IMPA. The merger was in process for two years before completed and was a fully executed transaction for six months before appellants filed this suit.

Although we do not condone any efforts to undermine the statutory rights given to members of agricultural cooperatives involved in mergers, we conclude, on the undisputed facts before the court, that the trial court correctly applied the doctrine of laches and granted judgment in favor of respondents on appellants' first cause of action.

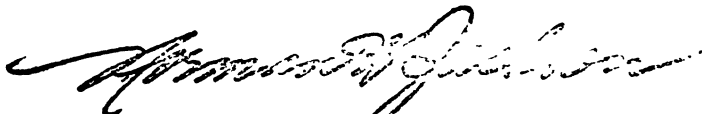
We next consider the other causes of action grounded on noncompliance with the statutory merger provisions. In both their second and fifth causes of action, appellants sought to derivatively assert the purported right of CVDA to rescind the merger and all attendant transfers of assets because of its failure to comply with the statutory merger provisions. Throughout this litigation, none of the parties has raised or briefed the preliminary issue of whether a cooperative's noncompliance with the merger provisions in the Agricultural Cooperative Association Act can even be asserted by the cooperative itself as a basis for rescinding its contract to merge or any transaction or document by which it transferred assets. If the statute cannot be used as a sword by the cooperative, the cooperative had no claims as set forth in the second and fifth causes of action that could be asserted either by the cooperative itself or by members on its behalf in a derivative action. In Sailer v. Land-Livestock-Recreation, Inc., 268 Or. 551, 522 P.2d 214 (1974), the court held that noncompliance with a similar statute requiring shareholder approval of a mortgage of substantially all of a corporation's assets was assertable only by shareholders. See Pitts, 476 N.E.2d at 427 (noncompliance "will not normally be a ground for invalidation at the instance of others"). Interpreting a similar Utah statute requiring shareholder approval of sales of all corporate assets, the Utah Supreme Court first seemed to say that the statute was not assertable at all by the corporation itself to void a lease with purchase option, but then backed off and appeared to pin the result on laches or estoppel by referring to the lapse of time the corporation had waited to seek avoidance of the lease, all the while accepting lease payments. U-Beva Mines, 471 P.2d at 869.

Because this important question was not raised or argued, we decline to resolve it here. Assuming that CVDA could assert its own noncompliance with the statutory merger provisions as a basis for setting aside its merger into IMPA and voiding all legal documents transferring assets to IMPA, the derivative claims seeking rescission set forth in appellants' second and fifth causes of action are, nonetheless, barred by laches for the same reasons already discussed. See Becker v. Becker, 66 Wis. 731, 225 N.W.2d 884, 885 (1975).

Finally, we address the trial court's disposition of appellants' third and fourth causes of action asserting negligence claims. The court considered several pending motions simultaneously and disposed of them in a brief and incomplete memorandum decision. See text at note 3, supra. It

is impossible for us to divine whether the court intended (a) to actually grant judgment on the third and fourth causes of action based on a conclusion that there could be no such negligence, e.g., because the merger provisions in sections 3-1-30 to -41 did not apply to the combination of cooperatives in this case; or (b) to dismiss the two causes of action based on negligence without prejudice for other reasons having to do with their derivative nature. For example, perhaps the court determined that, on the facts before it, appellants had not adequately demonstrated efforts to obtain the desired action from the CVDA directors or members or shown adequate reasons for the failure to make such efforts. See Utah R. Civ. P. 23.1. Or perhaps the trial court determined that the appellants would not fairly and adequately represent the interests of similarly situated members in enforcing any rights CVDA might have against its attorney and directors arising out of their alleged negligence. See id.

Because we are unable to determine the trial court's basis for entering judgment in favor of respondents on the two derivative negligence claims, we reverse the trial court's order of July 23, 1987, insofar as it relates to appellants' third and fourth causes of action and remand for further proceedings. However, insofar as the order dismisses appellants' first, second, and fifth causes of action and awards judgment to respondents, it is affirmed. The parties are to bear their own costs on appeal.

  
Norman H. Jackson, Judge

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I CONCUR:

  
J. Robert Bullock, Judge

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ORME, J. (concurring):

I concur in the court's exhaustive opinion disposing of this appeal. I question, however, our decision not to publish the opinion.

Although I do not quite agree that every appellate decision more extensive than an order merits publication, cf. Paffel v. Paffel, 732 P.2d 96, 104 (Utah 1986) (Zimmerman, J., concurring), I do believe that, absent unusual circumstances, if an appeal merits a full-blown opinion, the opinion should be published. Conversely, publication may properly be dispensed with where a short, summary opinion or a memorandum decision, employing only settled principles of law, is an adequate treatment of a comparatively simple appeal.

The instant appeal is factually complex and poses difficult legal issues. Accordingly, the court's opinion sets forth the facts in detail and analyzes the key issues carefully. It treats Utah statutory provisions which have not been considered in prior appellate decisions. Its discussion of laches in the context of corporate merger is insightful and would prove useful as precedential guidance to practitioners and trial courts confronting similar cases. Thus, the opinion merits publication.

This court's practice has been to defer completely to the main opinion's author on the question of whether or not a particular disposition is published. This case demonstrates the difficulty with that custom. If I had authored the opinion, it would be published. Because another judge has authored it, it will not be. This strikes me as an unsatisfactory state of affairs, especially since a decision not to publish is tantamount to depriving an opinion of any precedential value. See Utah Code of Judicial Administration § 4-508 (effective January 15, 1990). The court should reassess its practice in this regard.



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Gregory K. Orme, Judge

## APPENDIX B

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE  
STATE OF UTAH

-----  
GENE BRICE, et al )

Plaintiffs )

v. )

CACHE VALLEY DAIRY ASSOCIATION, )  
a Utah Argicultural )  
Cooperative, et al )

Defendants )  
-----

MEMORANDUM DECISION

Civil No. 25514

There have been various motions for partial summary judgment, motions to dismiss, motions for summary judgment, motions to have the Court determine whether a class action can be brought, and other motions to strike. The Court will address all of these motions collectively rather than individually.

As to the class action motion, the Court holds that the class action is not appropriate for reasons that three different classes, equity holders, producers, directors, may have different interests, and for other reasons that will be better understood as set forth in the body of this memorandum decision.

Plaintiffs are seeking recession of the action taken by the defendants of what is termed by the plaintiffs a merger under Section 31-31, U.C.A. They are also seeking restitution and a separate cause of action for money damages. The reason they seek this relief is that the defendants failed to affect a valid merger by reason of failure to comply with statutory procedures on mergers. The Court holds this to be correct. The Notice and Summary referred to a

Brice v. Cache Valley Dairy Assn.  
Civil No. 25514  
June 26, 1987  
Page Two

plan of merger (consolidation) but there is no description of a sale of assets as an alternative in the notice. The Court holds that the Notice was defective if it was contemplated there was to be a merger or consolidation. And, the Court in fact, holds that this never occurred. The Court, however, holds that a merger or consolidation is not an exclusive alternative to a change or affecting a consolidation by exchange of assets.

The Court holds that first there can be no recession as there are many other entities, people involved, that have so changed their position in reliance upon the transfer of assets that it would be inequitable for the Court to consider the remedies of recession and restitution. But, more importantly, the Court finds that there was no merger or consolidation, but there was a transfer of assets by CVD to IMPA for consolidation putting members or producers in CVD in a position where they may have a cause of action for monetary damage by reason of the elimination of all of the assets of CVD which destroys the value of their equity rights. The Court makes no holdings in this regard since there is no indications of a request for such damages in the complaint by the plaintiffs by reason of a sale of the assets, the plaintiffs relying solely for relief by reason of an invalid merger.


Brice v. Cache Valley Dairy Assn.  
Civil No. 25514  
June 26, 1987  
Page Three

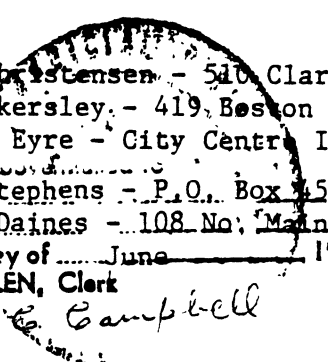
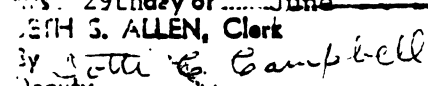
Therefore, the Court dismisses plaintiff's complaint against all defendants without prejudice to amend the complaint for any possible monetary damages by reason of the destruction of the plaintiffs equity in CVD as a result of transfer of assets.

Counsel for defendants to prepare the appropriate order.

Dated this 29th day of June, 1987.

BY THE COURT:

  
VeNoy Christoffersen  
District Judge

  
Roger P. Christensen - 510 Clark Leaming Bldg. - 175 So. West Temple - SLC, Utah 84101  
M. David Eggersley - 419 Boston Bldg. - SLC, Utah 84111  
J. Anthony Eyre - City Centre I, No. 330 - 175 East 4th South - SLC, Utah 84111  
R. Brent Stephens - P.O. Box 45000 - SLC, Utah 84145  
N. George Daines - 108 No. Main, Suite 200 - Logan, Utah 84321  
This 29th day of June 1987.  
JOSH S. ALLEN, Clerk  
By  Deputy

ROGER P. CHRISTENSEN  
ROGER FAIRBANKS  
CHRISTENSEN, JENSEN & POWELL, P.C.  
510 Clark Leaming Office Center  
175 South West Temple  
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JENKINS, MCKEAN & ASSOCIATES  
67 East 100 North  
Logan, Utah 84321  
(801) 752-4107

Attorneys for IMPA

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, J. ROLFE  
TUDDENHAM and GORDON ZILLES,  
on behalf of themselves, for  
the benefit of Cache Valley  
Dairy Association and for all  
members and/or Holders  
Certificates of Interest in  
Cache Valley Dairy Association,

ORDER

Plaintiffs,

vs.

Civil No. 25514

CACHE VALLEY DAIRY ASSOCIATION,  
a Utah Agricultural Cooperative;  
INTERMOUNTAIN MILK PRODUCERS  
ASSOCIATION; a Utah Agricultural  
Cooperative; VERNON BANKHEAD;  
RANDALL BRADSHAW; DON C. NYE;  
FRANK P. OLSEN; WILFORD B. MEEK;  
LATHAIR PETERSON; RULON KING;  
LARRY PITCHER; LYNN MICKEL;  
ROBERT HAWORTH; JEFF HYDE; EVAN  
SKINNER; ROBERT JACKSON; and  
WILLIAM LINDLEY; RANDON WILSON;  
JOHN DOES 1-30; SAN SOES 1-10,

Defendants.

Number 25514-71

JUL 25 1987

SETH S. ALLEN, Clerk

586

BOOK 067 PAGE 1003

Deputies

Various motions for partial summary judgment, motions to dismiss, motions for summary judgment, motions to have the Court determine whether a class action can be brought, motions to strike and other matters are currently pending before the Court. The Court, in this order, addresses these motions collectively, rather than individually.

The Court heard the arguments of counsel, reviewed the record in this case and issued a memorandum decision. Based thereon, and for the reasons stated therein, now, therefore, it is hereby Ordered that:

1. Plaintiffs' Request for Class Certification be, and hereby is denied;

2. Plaintiffs' claims for rescission and restitution be, and hereby are dismissed;

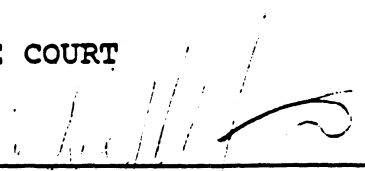
3. Plaintiffs' claims, as pleaded in this case, be and hereby are dismissed as to all Defendants without prejudice.

However, such dismissal is without prejudice to Plaintiffs' right to amend the complaint to assert such claims as Plaintiffs may have for monetary damages, to the extent Plaintiffs may have sustained such damages, for the destruction or diminution, if any, of the value of Plaintiffs' equity interests, as a result of a wrongful transfer of CVDA's assets to IMPA and the transfer of such equity interests from CVDA to IMPA. By granting leave to Plaintiffs to assert such claims, the Court makes no determination as to whether the transfer of assets was wrongful and makes no determination as to the merit, if any, of such claims, but reserves such determinations for future

consideration.

DATED this 23<sup>rd</sup> day of July, 1987.

BY THE COURT



---

VeNoy Christoffersen  
District Court Judge

## APPENDIX D

EXHIBIT A

NOTICE TO MEMBERS OF CACHE VALLEY DAIRY ASSOCIATION

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a Plan of Merger (Consolidation) under Section 3-1-30. et. seq., Utah Code Annotated, be submitted to a vote of the members of Cache Valley Dairy Association at a special meeting of members to be held at 10:30 o'clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

The principal purpose of the meeting is to consider and vote upon the Plan of Merger (Consolidation) of Cache Valley Dairy Association, Western General Dairies, Inc., Star Valley Producers, Inc. and Lake Mead Cooperative Association into Intermountain Milk Producers Association.

A summary of the Plan of Merger (Consolidation) is enclosed with this Notice. A full copy of the plan shall be furnished to any member upon request without charge. Requests should be made to Intermountain Milk Producers Association, 195 West 7200 South, Midvale, Utah 84047.

Passage of this plan will require a simple majority of the members present at the meeting and voting thereon.

By order of the President as of this 25th day of November, 1985.

CACHE VALLEY DAIRY ASSOCIATION

By /s/ Wm. L. Lindley  
President

## SUMMARY OF PLAN OF MERGER (CONSOLIDATION)

1. Cache Valley Dairy Association, Western General Dairies, Inc. Lake Mead Cooperative Association and Star Valley Producers, Inc. ("Consolidating Cooperatives") propose to consolidate their assets into Intermountain Milk Producers Association, formed under Title 3, Utah Code Annotated, as an agricultural cooperative association ("IMPA")

2. The terms and conditions are: 1) the Consolidating Cooperatives will transfer to IMPA all of their assets at book value in exchange for the promise by IMPA to assume all liabilities of said cooperatives; b) All membership agreements held by said cooperatives shall be assigned to and assumed by IMPA in accordance with their terms; c) all milk base held by members shall become milk base of IMPA on a pound-for-pound basis subject to the same rules, regulations and agreements in effect on the day the plan is adopted; d) all equities held by members of said cooperatives shall become equities of IMPA on a dollar-for-dollar basis subject to existing rules, regulations and agreements; f) all agreements, contracts, claims and obligations whatsoever, of said cooperatives shall be assumed by IMPA as though originally held by IMPA; g) All employees employed by said cooperatives as of the date of approval of the plan shall become employees of IMPA and all retirement plans, vacation accruals or other employee benefits shall be assumed by IMPA; and h) all other provisions of the Agreement of Merger (Consolidation).

3. The surviving corporation, IMPA, shall be governed by the Utah Uniform Agricultural Cooperative Association Act.

4. No changes will be required in the Articles of Incorporation of IMPA.

5. The eighteen (18) board members of IMPA shall establish districts which shall include all areas in which IMPA members reside and shall arrange for the election of directors from said districts at the fall 1986 district meetings for seating as the annual meeting of IMPA in January 1987.

6. The Presidents and Secretaries of the respective Consolidating Cooperatives shall execute such documents as are necessary to carry out the plan.

## APPENDIX E

## LETTER OF INTENT

THIS LETTER OF INTENT is among CACHE VALLEY DAIRY ASSOCIATION of Smithfield, Utah, hereinafter called "CV"; WESTERN GENERAL DAIRIES, INC. of Midvale, Utah, hereinafter called "WG"; STAR VALLEY PRODUCERS, INC. of Thayne, Wyoming, hereinafter called "SV" and LAKE MEAD COOPERATIVE ASSOCIATION of Las Vegas, Nevada, hereinafter called "LM" and all of which are sometimes hereinafter collectively referred to as "Parties".

1. The Parties are all agricultural cooperatives without capital stock, with producer members and operate in the intermountain area. The Parties have determined after considerable discussion and negotiation to form a marketing agency in common to be called "INTERMOUNTAIN MILK PRODUCERS ASSOCIATION", a Utah agricultural cooperative, hereinafter called "IMPA" and to pursue other common goals as set out in this letter.

2. The Board of Directors of IMPA will initially consist of eight (8) members from CV, eight (8) members from WG, one (1) member from SV and one (1) member from LM for a total of eighteen (18) members. A majority of the Board members are required to constitute a quorum for board meetings and sixty percent (60%) of a quorum must approve any action by the Board.

3. It is the intention of the Parties to proceed immediately to form IMPA and to make appropriate notifications and applications to government agencies which would allow for the commencement of operation of IMPA by August 1, 1984 (hereinafter called the "Commencement Date"). The implementation of IMPA is contingent upon the approval by the Board of Directors of all of the Parties hereto of definitive documents and agreements and upon review by the United States Department of Justice and the Federal Trade Commission.

4. It will be necessary for all Parties to obtain as of July 31 or such other day as IMPA commences operations, a formal audit by a Certified Public Accountant which will be completed as soon after said date as possible and which will be made available to the all Parties and to their agents in implementing IMPA.

5. It is the intent of the Parties that the combined net profits of all the parties and of IMPA be allocated to said parties based on the milk delivered by each party to IMPA after considering all the combined income and expenses of the parties including IMPA. A formal audit by certified public accountants of each of the parties will be made on all of the parties as of the year-end when allocation of the combined income is made to all of the parties by IMPA.

6. The ultimate goal of the Parties is to consolidate their operations into IMPA, however, this

consolidation will take place over a period of time in phases which will not be completely specified at this time but will require further Board and/or membership approval of the parties as may be required by law at that time.

7. On the Commencement Date, IMPA will provide management to all existing milk processing plants and all other functions of the Parties, including but not limited to reviewing existing union contracts, wage rates and other personnel matters and benefits, etc.

8. Plants and physical assets of the Parties will remain under the ownership of the Parties and will be made available through lease or other mechanisms to IMPA.

9. All employees except certain management employees remain employees of existing employers and will carry out functions delegated by IMPA. Certain management employees will become employees of IMPA and any existing contracts relating to said employees shall be honored. Employers will be reimbursed all costs of providing labor as directed by IMPA.

10. IMPA will cause the Parties to be reimbursed for the use of their plants through the payment of debt and other reimbursement.

11. Each plant will be operated as a "profit center" in order to assist management in evaluating the operation of said plant and to provide "profit figures" for purposes of profit sharing contribution where required.

12. Milk will be received at the farm of members of the parties and will be delivered by the Parties at the farm to IMPA which will transport the milk to the plants for processing and marketing.

13. Initially, IMPA will assess Grade A milk, a per unit retain of \$.15 per cwt and Grade B milk, a per unit retain of \$.10 per cwt.

14. Payment of IMPA to the Parties for milk will be made at such uniform prices and on such component pricing as shall be set by IMPA.

15. Those members of the parties who do not hold base and who desire and are able to qualify for Grade A permits and who commence shipping Grade A milk shall be allocated base equal to fifty percent (50%) of their production, which base will increase by two percent (2%) per month for the next twenty-five (25) months. Base of members of the parties who are Grade A producers holding base will be adjusted over twenty-five (25) months to be at 100% of production at the end of twenty-five (25) months. Allocations and adjustments to base hereunder are based on production levels as of the date hereof, provided that base as allocated and adjusted will not exceed the daily average production of a producer with a member for the year 1983. The Board of Directors of IMPA will be empowered to make exceptions on a case by case basis to the 1983 limitation where necessary to avoid unforeseen hardship to a member.

16. IMPA shall process producer payrolls for the Parties and shall provide bookkeeping service for the Parties. Existing bookkeeping systems will be maintained until such time as the Parties are satisfied that the bookkeeping system of IMPA is adequate for utilization of the Parties in event the consolidation does not take place. Effective on the commencement date or as soon thereafter as is practicable, inventories of milk and other products will be transferred to IMPA along with accounts receivable, cash and other current assets and IMPA shall assume all accounts payable and shall provide funds with which the Parties may pay any debts or obligations which are not assumed.

17. IMPA shall cause all products to be marketed through existing personnel and marketing channels of the Parties.

18. IMPA will be charged with responsibility of cash management, arranging credit and other bookkeeping and managerial duties.

19. At the time the consolidation is accomplished, all members of the parties will terminate their membership in the parties and will be given membership in IMPA. All remaining assets of the Parties will be transferred to IMPA at book value and all remaining debts will be assumed by IMPA. All employees will be transferred to IMPA, subject to any labor

contracts which may then exist. Producer equities held by the Parties will be assumed by IMPA and will be rotated on a uniform basis.

20. The Board of Directors of IMPA will provide for districts from which directors will be seated at the annual meeting of IMPA in 1987 or at the time of full consolidation and directors will be elected from said districts at that time.

21. The Parties hereto will negotiate in good faith definitive agreements and documents for the purpose of implementing IMPA. In the event definitive agreements and documents are not entered into by the Commencement Date, the matters set forth in this letter shall be terminated and shall become null and void.

22. The Parties shall furnish to each other and to their designated officials such financial or other information as is required and necessary to carry out the intention expressed herein.

IN WITNESS WHEREOF, the parties have executed this Letter of Intent as of the 15th day of June, 1984.

CACHE VALLEY DAIRY ASSOCIATION

By Wm L Lindby

## APPENDIX F

RESOLUTION

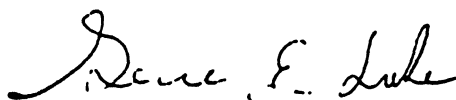
WHEREAS, the members of Lake Mead Cooperative Association and Star Valley Producers, Inc. previously voted to consolidate their assets with those of IMPA and such consolidation has been accomplished; and

WHEREAS, the members of Cache Valley Dairy Association and Western General Dairies Inc. voted in special membership meetings held December 16, 1985 to approve a plan of merger (consolidation) with IMPA or in the alternative to authorize the assets of said Cooperatives to be conveyed and membership agreements to be assigned in exchange for the assumption of debt and producer equities; and

WHEREAS, the plan of merger (consolidation) allowed for abandonment thereof pursuant to statute; and whereas the board of IMPA has made a preliminary determination that said plan should be abandoned

NOW THEREFORE, it is hereby resolved that the plan of merger (consolidation) be abandoned and that the alternative procedure be followed with respect to the conveyance of assets, assignment of membership agreements and assumption of debts and equities on such a schedule and at such a time as shall meet the objectives of IMPA.

The foregoing Resolution was adopted by the board of IMPA on December 19, 1985.

  
Assistant Secretary

## APPENDIX G

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RECEIVED  
JUL 10 1937  
CLERK OF DISTRICT COURT

N. George Daines - 0803  
Kevin E. Kane - 3939  
DAINES & KANE  
108 North Main, Suite 200  
Logan, UT 84321  
Telephone: (801) 753-4403

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS  
QUAYLE, THEDFORD ROPER,  
J. ROLFE TUDDENHAM,  
and GORDON ZILLES, on  
behalf of themselves,  
for the benefit of  
Cache Valley Dairy  
Association and for all  
members and/or Holders of  
Certificates of Interest in  
Cache Valley Dairy  
Association,

Plaintiffs,

vs.

CACHE VALLEY DAIRY  
ASSOCIATION, a Utah  
Agricultural Cooperative;  
INTERMOUNTAIN MILK PRODUCERS  
ASSOCIATION; a Utah  
Agricultural Cooperative;  
VERNON BANKHEAD; RANDALL  
BRADSHAW; DON C. NYE; FRANK P.  
OLSEN; WILFORD B. MEEK;  
LATHAIR PETERSON; RULON KING;  
LARRY PITCHER; LYNN MICKEL;  
ROBERT HAWORTH; JEFF HYDE;  
EVAN SKINNER; ROBERT JACKSON;  
and WILLIAM LINDLEY;  
RANDON WILSON; JOHN  
DOES 1-30; SAM SOES 1-10,

Defendants.

VERIFIED COMPLAINT

Civil No.

---

GENERAL ALLEGATIONS

25514-1  
58  
JUL 10 1937  
SETH S. ALLEN, Clerk

COME NOW the Plaintiffs by this Verified Complaint and complain and allege against the various Defendants as follows:

1. Defendant Cache Valley Dairy is an Agricultural Cooperative Association organized and operated under Title 3 of the Utah Code Annotated.

2. The principal place of business, corporate offices and designated location of CVD is Cache County, Utah.

3. Each Plaintiff was a Director of CVD at the time of the purported merger and as such remains to date.

4. Plaintiffs Hall, Tuddenham and Zilles are residents of Cache County, Utah.

5. Each Plaintiff was a Member of CVD at the time of the purported merger.

6. Each Plaintiff is a holder of Certificates of Interest (hereinafter referred to as Equity Holder) of more than \$50.00 in Cache Valley Dairy Association as defined in the Amended Articles of Incorporation of the Cache Valley Dairy Association (hereinafter CVD).

7. Defendant IMPA purports to be an Agricultural Cooperative Association organized and operated under Title 3, U.C.A.

8. Defendant Intermountain Milk Producers Association (hereinafter IMPA) purports to be a survivor or successor association of a merger between CVD and other agricultural co-operatives, to wit; Western General Dairy, Inc., Star Valley Producers, Inc. and Lake Mead Cooperative Association.

9. Defendants Bankhead, Bradshaw, Nye, Olsen, Meek,

Peterson, King, Pitcher, Mickel, Haworth, Hyde, Skinner, Jackson, and Lindley were Directors of CVD at the time of the merger and so remain.

10. Defendant Randon Wilson is an attorney at law licensed to practice under the laws of the State of Utah, a member of the law firm of JONES, WALDO, HOLBROOK & McDONOUGH.

11. John Doe 1-30 are other Defendants who are participants and advisors to CVD and its directors with respect to the said merger and as such individuals are identified they will be named by amendment, and Plaintiffs hereby reserve that right.

12. Defendants Sam Soe 1-10 are parties who have received title, claim liens or purport to have taken secured interests in CVD assets from IMPA.

13. Plaintiffs as described in paragraphs 3 through 6 hereinabove are qualified to be representatives of a larger class consisting of all CVD Members and/or Equity Holders existing now or at all times pertinent hereto and that said Plaintiffs as representatives face the same or identical questions of law and fact which are common to the entire class and as representatives would fairly and adequately represent and protect the entire class.

14. That to include all Producers and Equity Holders as Plaintiffs would be burdensome because of their large numbers and therefore their joinder would be impractical.

15. That the court should as soon as is practicable make a determination of the maintenance of this class action and qualify

the representatives of the class pursuant to Rule 23 U.R.C.P.

16. That although Plaintiffs believe the same or identical questions of law exist between all members of the entire class because of the peculiar nature of the class where there are equity holders who are not producers, and producers who are not Directors, etc., Plaintiffs ask that the Court review these various subgroups and determine if any peculiar interests exist which may vary or conflict to a material degree between certain of the subgroups of the class, and if the Court deems it necessary, to then appoint independent counsel for the single and sole purpose of reviewing said special or peculiar interests to insure that these are addressed, protected, and adequately represented.

17. That the Court should also determine how required notice to the class and other costs of maintenance should be apportioned.

#### FIRST CAUSE OF ACTION

##### ILLEGAL MERGER

As and for a First Cause of Action, Plaintiffs incorporate and restate herein the General Allegations set forth hereinabove and further complain and allege as follows:

18. That Defendants CVD and IMPA wholly failed to follow the legal procedures which were a condition precedent to the merger of CVD into IMPA.

19. That mergers of Agricultural Cooperative Associations

shall be in accordance with the procedures set forth in Section 3-1-30 et seq. U.C.A.

20. That Section 3-1-31 provides that the Board of Directors approve a plan of merger setting forth certain specific details as required by that statute.

21. That Section 3-1-32 requires that a plan of merger be submitted to a vote at a meeting of the members of the agricultural cooperative association.

22. That Sections 3-1-32 and 3-1-33 require that all members and equity holders holding certificates of interest of \$50.00 or more be afforded all the rights of members with respect to approving a plan of merger, including notice of the meeting to consider the plan and the right to vote on the plan.

23. That Section 3-1-35 provides that with respect to voting on a plan of merger, Members may vote by delegate and/or proxy.

24. That Section 3-1-36 provides that upon approval of the merger, articles of merger shall be signed by the president and secretary of the association which articles shall set forth the plan of merger, recitations concerning notice of the meeting and voting therein wherein the merger was approved by the Members entitled to vote thereon. Further that originals be filed with the Secretary of State along with a filing fee and that a Certificate of Merger be obtained from the Secretary of State.

25. That the Board of Directors of CVD did not approve at any time a plan of merger as required by Section 3-1-31.

26. That the Notice attached hereto as Exhibit A is a true copy of the notice used to advertise a meeting to consider the merger of CVD into IMPA.

27. That said notice states that the merger is to be completed in accordance with Section 3-1-30 et. seq.

28. That in clear violation of Section 3-1-33 holders of certificates of interest (Equity Holders) in CVD of \$50 or more were not provided with any notice whatsoever of the CVD special meeting of members held on December 16, 1985 to consider the IMPA plan of merger.

29. That at the said special meeting Equity Holders of \$50 or more were not allowed to vote on the plan of merger.

30. That at the said special meeting, no voting was allowed by delegate or proxy.

31. That the requisite number of affirmative votes needed to approve the plan of merger pursuant to Section 3-1-35, Utah Code Annotated, was not obtained.

32. That no dissenter's rights were acknowledged or honored all in violation of Section 3-1-39 and pursuant to the design and plan of IMPA, and Defendant Directors, and through them CVD. That this denial was done knowingly and continues to be pursued in various legal efforts to date.

33. That in an illegal and defacto manner, CVD, the Defendant directors and IMPA acted wilfully and wantonly as if the merger was legal and effective knowing it was not.

34. That in violation of Section 3-1-36 there have been no

Articles of Merger approved or even presented to the Board of Directors of CVD nor have they been filed with the secretary of state nor has a Certificate of Merger been obtained.

35. That the purported merger of CVD into IMPA is illegal and as such is null and void.

36. That as a result of said Defendants' illegal and willful and wanton actions, certain assets and equity of CVD have been transferred, mortgaged, sold, liened, assigned or otherwise seriously impaired.

37. That IMPA continued without any right whatsoever to sell milk products of CVD under the trade names and brands of CVD, traded on the latter's goodwill, operated at the same plants and warehouses, continued with the managing personnel and employees, and in every way usurped and appropriated the highly successful business of CVD and operated this business to its own gain and profit.

38. That said Defendants by appropriating the successful business of CVD have deprived it of the opportunity of further financial benefit and gain in continuing the operation of the business.

39. That as a result of the illegal merger and the activities subsequent thereto the assets of CVD have been diluted and dissipated, all to the damage of CVD in an amount exceeding fifty-five million dollars (\$55,000,000.00), and Plaintiffs are entitled to an award of money damages as a result thereof.

40. That Defendant IMPA and the individual Defendant

Directors herein named, are jointly and severally liable for the damage to Plaintiffs' interests in Defendant CVD.

41. That alternatively to money damages, the Plaintiffs are entitled to an Order directing IMPA to rescind the purported merger, restoring CVD to its former estate in all of its property of every kind, free and clear of any and all encumbrances except such as existed at the time of the purported merger. Further that said Defendants account for any and all profits received and pay for such damages as shown to have been suffered by CVD.

42. That as a result of the damages complained of hereinabove, the Plaintiffs and in their capacity as representatives of the interests of CVD, have suffered and do continue to suffer on a daily basis immediate and irreparable harm and damage.

43. That Plaintiffs, be awarded attorneys fees, costs and expenses of this action and the same be apportioned among all the Plaintiffs as a class.

WHEREFORE, Plaintiffs pray for judgment and relief jointly and severally against the Defendants CVD, IMPA, and the individually named Defendant Directors as follows:

A. For a determination by this court that the Plaintiffs are qualified and approved as representatives of the class described herein and a determination as to who are members of the class pursuant to Rule 23(c)(3), U.C.A.

B. For a determination by this Court that the Class Action is maintainable pursuant to Rule 23(c)(1), U.C.A.

C. For a determination by this Court as to how notice shall be provided to members of the class and how costs and other expenses of maintenance of this action should be apportioned and assessed, including attorney fees.

D. For a judgment against the Defendants, jointly and severally, for damages of not less than \$55,000,000.00 as and for the complete and total destruction of the Plaintiffs' equity in CVD and their ability to market their milk products in their known and established markets, along with a determination as to how such money should be distributed to the class and pay the costs and expenses of maintaining this action, including attorneys fees.

E. Alternatively, to an award of money damages that the merger be set aside by:

(1) An Order from this Court requiring that if the fully constituted Board of CVD in the future legally authorizes a new special meeting to approve the IMPA plan of merger or any other plan of merger that such meeting be conducted in a manner guaranteeing a proper vote of the Members of entitled to vote and affording such Members all of the rights required under Title 3, U.C.A., including proper notice and voting rights of equity holders of \$50.00 or more, right of proxy and delegate voting, and notice of and the exercise of dissenter's rights, if a merger is approved, including the right of an appraisal and

payment of fair value of the dissenter's interest.

(2) An injunction enjoining Defendant IMPA from operating as a successor or survivor cooperative of CVD, and enjoining Defendant IMPA from impairing any assets of CVD.

(3) For an injunction enjoining Defendant IMPA from Selling under the trade names and brands of CVD, i.e., Cache Valley Cheese, or otherwise operating under the goodwill of CVD.

(4) For an injunction enjoining Defendant IMPA from operating at the plant of CVD or using the rolling stock of CVD and that possession of the same be immediately returned to the possession of Plaintiffs.

(5) For a determination of damages and an accounting as to profits and rent and an award of damages sufficient to restore Plaintiffs and CVD to its full and former estate.

F. For a determination of a reasonable attorneys fee herein and how said fees and costs and expenses of maintaining this action shall be apportioned.

## SECOND CAUSE OF ACTION

### SHAREHOLDERS DERIVATIVE ACTION

As and for a Second Cause of Action, in the form of a Stockholders Derivative Action, pursuant to Rule 23.1, Utah Code Annotated, Plaintiffs by this reference restate and incorporate

herein the General Allegations and First Cause of Action and further complain and state as follows:

44. That the action is not a collusive one to confer jurisdiction not otherwise available.

45. That the Plaintiffs were Members and Equity Holders of CVD at the time of the purported IMPA merger which took purported effect on or about January 1, 1986.

46. That at Plaintiffs' request and that of other CVD directors, two special meetings of the Board of Directors of CVD have been duly called and held. At each of said meetings there were discussions of the illegality of the merger and a memorandum discussing these illegalities and the possible effects were presented to all of the directors by counsel for Plaintiffs. On each occasion the Board of Directors refused to take affirmative action to protect the Association, its Members and Equity Holders from the resulting damages as discussed hereinabove.

47. That as of the time of the filing of this complaint, no actions have been taken by CVD or IMPA, or any of the other defendants either as directors or members to protect the Association or the Members or Equity Holders of the Association.

48. That by reason of the control which the individual Defendants have over CVD and the producers thereof, CVD is unwilling and unable to take action to assert its rights against IMPA and the individual Defendants and each of them, and only by the interposition of a court of equity in this suit can the rights of Plaintiffs to have CVD protect its property and

business be asserted and maintained.

49. That the Plaintiffs can fairly and adequately represent the interests of the Cache Valley Dairy Association.

50. That the Plaintiffs are entitled to have the court order CVD to pay their costs and expenses for this action including attorney fees.

WHEREFORE, Plaintiffs pray judgment jointly and severally against Defendant IMPA and Defendant Directors, all for the benefit of CVD as follows:

A. For the damages and relief enumerated in the First Cause of Action.

B. For such other and further relief as the court shall deem equitable.

### THIRD CAUSE OF ACTION

#### NEGLIGENCE

As and for a Third Cause of Action, as Directors, as Class Representatives and on behalf of the Association, Plaintiffs restate the General Allegations and the First and Second Causes of Action and by this reference incorporate the same hereinbelow and further complain and allege as follows:

51. That Randon Wilson is an attorney licensed to practice law under the laws of the State of Utah and as such owes a duty of due care to those he provides legal advice.

52. Defendant Randon Wilson as an attorney undertook to provide legal advice to CVD and its Board of Directors concerning

the merger into IMPA. Pursuant thereto he provided advice to CVD, its Directors and Officers.

53. Said Defendant drafted documents, gave advice concerning the type of notice of merger to be given and to whom it was to be sent. He also provided legal advice as to the conduct of the special meeting relative to approval of the merger and as to entitlement to vote thereon.

54. Subsequent to the merger meeting said Defendant prepared legal documents and caused them to be used to transfer the assets of CVD to IMPA.

55. That Defendant Wilson's advice and documents were relied upon by CVD and its Directors and Officers. No other legal advice was obtained.

56. That Defendant CVD and its Directors and Officers followed the directions of their counsel Defendant Wilson.

57. That in so doing CVD and its Directors and Officers violated as hereinbefore stated Section 3-1-30, et. seq.

58. That said Defendant wholly failed to reasonably inform of alert the Board of Directors and Officers of CVD of:

A. the statutory merger procedures as per Section 3-1-30 et. seq.; and,

B. that those procedures were not being followed; and,

C. that CVD Directors and Officers could be liable for not following those procedures; and,

D. of the questionable transfer of CVD property, trademarks, goodwill etc. to IMPA; and,

E. in numerous instances specifically advised against the efforts of others to follow the procedures of Section 3-1-30, et. seq.

59. That the activities of said Defendant in providing legal advice, documents and the complete failure to disclose the statutory prerequisites to merger was careless, unskillful, negligent and grossly negligent.

60. That said Defendant failed to exercise due diligence and skill.

61. That said Defendant failed to make the requisite disclosures to his clients which would have allowed them to exercise a reasonable amount of diligence in carrying out their duties as Officers and Directors of CVD.

62. That Defendant Wilson failed to follow the standard of care and skill expected of an attorney.

63. That Defendant Wilson advised CVD at the same time he advised other individuals and entities who had interests adverse and in conflict with that of CVD all in violation of his duty of trust, loyalty and confidentiality to CVD and its Directors and Officers. These entities include IMPA and the other merger participants.

64. That as a direct and proximate result of Wilson's negligence and failure to disclose conflicts of interest, the Plaintiffs, the Class of Members and Equity Holders and CVD have suffered the damage heretofore alleged.

65. That Defendant Wilson when he learned of the pendency

of this action attempted to scuttle the same by promising to have IMPA indemnify CVD Directors who would not take this action and alternatively by threatening reprisals against those who did.

WHEREFORE, Plaintiffs pray judgment jointly and severally against said Defendant Wilson as follows:

A. For the damages and relief enumerated in the First Cause of Action.

B. For such other and further relief as the court shall deem equitable.

#### FOURTH CAUSE OF ACTION

##### DIRECTORS' NEGLIGENCE

As and for a Fifth Cause of Action, as Directors, as Class Representatives and on behalf of CVD, Plaintiffs restate the General Allegations and the First, Second, Third and Fourth Causes of Action and by this reference incorporate the same hereinbelow and further complain and allege as follows:

66. That at all times pertinent hereto the Defendant Directors Bankhead, Bradshaw, Nye, Olsen, Meek, Peterson, King, Pitcher, Mickel, Haworth, Hyde, Skinner, Jackson, and Lindley were duly elected and acting Directors of CVD.

67. That with respect to the preparation of a plan of merger into IMPA, and with respect to fulfilling the statutory requirements for accomplishing the purported merger, the Defendant Directors have at some point learned or should have learned that it was done improperly.

68. That the Defendant Directors have at some point learned or should have learned that the assets of CVD were improperly transferred to IMPA and otherwise impaired.

69. That said Directors breached and/or neglected their duty of due care and diligence to CVD and are therefore liable for the losses and/or injuries which proximately resulted to the Plaintiffs as stated hereinabove.

70. That the said Defendant Directors should have learned at some point or did learn that the Equity Holders of \$50.00 or more should have been given an opportunity to approve the merger and that by denying them notice and the right to vote, said Directors breached their duty of due care and their fiduciary duty to those Members. That said breach of duty was a proximate cause of the damages which Plaintiffs complain of hereinabove.

71. That the said Defendant Directors knew or should have known or at some point learned that they were also denying or had denied other Members the statutory right to vote by denying proxy or delegate voting which was directly contrary to statutory provisions, and that by so denying said voting the Directors breached their duty of due care and fiduciary duty to said Members who would have voted by delegate or proxy who were otherwise denied the opportunity to participate in the vote to approve the merger. That said breach of duty by the Defendant Directors was a proximate cause of the damages complained of by the Plaintiffs as described hereinabove.

72. That the neglect and breach of duties by the Defendant

Directors as described hereinabove constitutes negligence on the part of said Directors which has proximately caused damage to the Plaintiffs and in addition has caused similar damage to CVD and said Directors should be required to indemnify CVD as a result of their negligence and breach of duty.

73. That even if the Defendant Directors relied on the expert opinion of Defendant Wilson, said Directors at some point were reasonably alerted to information and circumstances which put them upon inquiry that the measures taken to accomplish the merger were illegal and damaging to CVD and the Plaintiffs and therefore cannot excuse said Directors from their actions.

74. That Title 3 of the Utah Code Annotated specifically imposes statutory requirements on the Defendant Directors by which they must follow to accomplish a merger. That said Directors did not follow said statutory requirements and therefore are responsible for the resulting damage proximately caused as a result of their violation of said statutes.

WHEREFORE, Plaintiffs pray judgment jointly and severally against said Defendant Directors as follows:

A. For the damages and relief enumerated in the First Cause of Action.

B. For such other and further relief as the court shall deem equitable.

FIFTH CAUSE OF ACTION

## RESCISSION

As and for the Fifth Cause of Action, Plaintiffs incorporate all the previous allegations stated herein and complain against the Defendants Sam Soe 1-10 as follows:

75. That Sam Soe 1-10 are persons who subsequent to the purported merger of CVD into IMPA took title to property of CVD from IMPA or have taken liens, mortgages, encumbrances or secured interests in the property of CVD.

76. That said transfers and hypothecations are null and void by reason of the fact that IMPA had no authority to alienate or hypothecate the property of CVD.

77. That CVD should be restored full and unencumbered title to all of its property both inchoate and real excepting only those encumbrances in existence at the time of the purported merger.

WHEREFORE, Defendants Sam Soe 1-10 should be ordered to release, relinquish and reconvey any and all secured interest, liens or property received from IMPA. And further that the court order such other and further relief as it deems equitable and necessary under the circumstances.

DATED this 11 day of February, 1987.

Gene Brice  
Gene Brice

VERIFICATION

STATE OF UTAH                   )  
                                  (ss:  
County of Cache                )

COMES NOW, Gene Brice, being first duly sworn, deposes and states that he has each individually read the foregoing Verified Complaint and understands the contents thereof and that the contents thereof are true and correct to the best of his knowledge, except those matters stated on information and belief and as to those matters he believes them to be true.

Gene Brice  
Gene Brice

SUBSCRIBED and sworn to before me this 11 day of February, 1987.

Commission expires: 3/3/87

[Signature]  
Notary Public  
Residing at: Hydro Park, ut.

DATED this 12 day of February, 1987.

Willis S. Hall  
Willis Hall

VERIFICATION

STATE OF UTAH            )  
                              (ss:  
County of Cache         )

COME NOW, Willis Hall, being first duly sworn, deposes and states that he has read the foregoing Verified Complaint and understands the contents thereof and that the contents thereof are true and correct to the best of his knowledge, except those matters stated on information and belief and as to those matters he believes them to be true.

Willis S. Hall  
Willis Hall

SUBSCRIBED and sworn to before me this 12 day of February, 1987.

Commission expires: 3/3/87

[Signature]  
Notary Public  
Residing at: Hyper Park, UT

DATED this 12 day of February, 1987.

Joseph R. May  
Joseph R. May

VERIFICATION

STATE OF UTAH                   )  
                                  (ss:  
County of Cache                )

COME NOW, Joseph R. May, being first duly sworn, deposes and states that he has read the foregoing Verified Complaint and understands the contents thereof and that the contents thereof are true and correct to the best of his knowledge, except those matters stated on information and belief and as to those matters he believes them to be true.

Joseph R. May  
Gene Brice

SUBSCRIBED and sworn to before me this 12 day of February, 1987.

Gene Brice  
Notary Public  
Residing at: Lynn ut.

Commission expires:

Dec 7. 1989

DATED this 12 day of February, 1987.

Douglas Quayle  
Douglas Quayle

VERIFICATION

STATE OF UTAH                   )  
                                  (ss:  
County of Cache                )

COME NOW, Douglas Quayle, being first duly sworn, deposes and states that he has read the foregoing Verified Complaint and understands the contents thereof and that the contents thereof are true and correct to the best of his knowledge, except those matters stated on information and belief and as to those matters he believes them to be true.

Douglas Quayle  
Douglas Quayle

SUBSCRIBED and sworn to before me this 12 day of February, 1987.

Commission expires:

Dec 7, 1989

Lyth T. Holden  
Notary Public  
Residing at: Logan, Ut.

DATED this 12 day of February, 1987.

*Thedford Roper*  
Thedford Roper

VERIFICATION

STATE OF UTAH                    )  
                                      (ss:  
County of Cache                )

COME NOW, Thedford Roper, being first duly sworn, deposes and states that he has read the foregoing Verified Complaint and understands the contents thereof and that the contents thereof are true and correct to the best of his knowledge, except those matters stated on information and belief and as to those matters he believes them to be true.

*Thedford Roper*  
Thedford Roper

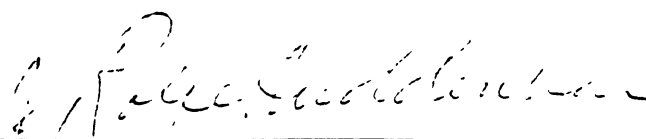
SUBSCRIBED and sworn to before me this 12 day of February, 1987.

*L. H. Throckmorton*  
Notary Public  
Residing at: *Payson, Utah*

Commission expires:

*Dec 7, 1989*

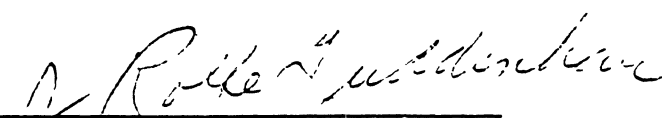
DATED this 12 day of February, 1987.

  
\_\_\_\_\_  
J. Rolfe Tuddenham

VERIFICATION

STATE OF UTAH            )  
                              (ss:  
County of Cache         )

COME NOW, J. Rolfe Tuddenham, being first duly sworn, deposes and states that he has read the foregoing Verified Complaint and understands the contents thereof and that the contents thereof are true and correct to the best of his knowledge, except those matters stated on information and belief and as to those matters he believes them to be true.

  
\_\_\_\_\_  
J. Rolfe Tuddenham

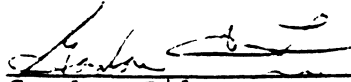
SUBSCRIBED and sworn to before me this 12<sup>th</sup> day of February, 1987.

Commission expires: 3/3/87

  
\_\_\_\_\_  
Notary Public

Residing at: 4, 1st St. N. -

DATED this 12 day of February, 1987.

  
Gordon Zilles

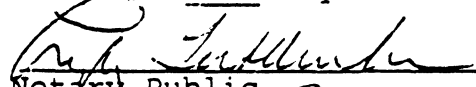
VERIFICATION

STATE OF UTAH            )  
                              (ss:  
County of Cache         )

COME NOW, Gordon Zilles, being first duly sworn, deposes and states that he has read the foregoing Verified Complaint and understands the contents thereof and that the contents thereof are true and correct to the best of his knowledge, except those matters stated on information and belief and as to those matters he believes them to be true.

  
Gordon Zilles

SUBSCRIBED and sworn to before me this 12 day of February, 1987.

  
Notary Public  
Residing at: Longview

Commission expires:

Dec 31, 1989

EXHIBIT A

NOTICE TO MEMBERS OF CACHE VALLEY DAIRY ASSOCIATION

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a Plan of Merger (Consolidation) under Section 3-1-30, et. seq., Utah Code Annotated, be submitted to a vote of the members of Cache Valley Dairy Association at a special meeting of members to be held at 10:30 o'clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

The principal purpose of the meeting is to consider and vote upon the Plan of Merger (Consolidation) of Cache Valley Dairy Association, Western General Dairies, Inc., Star Valley Producers, Inc. and Lake Mead Cooperative Association into Intermountain Milk Producers Association.

A summary of the Plan of Merger (Consolidation) is enclosed with this Notice. A full copy of the plan shall be furnished to any member upon request without charge. Requests should be made to Intermountain Milk Producers Association, 195 West 7200 South, Midvale, Utah 84047.

Passage of this plan will require a simple majority of the members present at the meeting and voting thereon.

By order of the President as of this 25th day of November, 1985.

CACHE VALLEY DAIRY ASSOCIATION

By /s/ Wm. L. Lindley  
President

## APPENDIX H

## APPENDIX H

### Plaintiffs' No. 1:

That Plaintiffs are directors, members, former members and/or equity holders of more than \$50.00 in CVDA. Verified Complaint at 3, 5 and 6.

### Defendants' Response to No. 1:

Defendants agree that each Plaintiff was at one time either a director, member, former member, or equity holder of more than \$50.00 in CVDA.

### Plaintiffs' No. 2:

That CVDA and IMPA are both Utah Agricultural Cooperative Associations (corporations) organized and operated under Title 3, U.C.A. Verified Complaint at 1 and 7.

### Defendants' Response to No. 2:

Defendants admit that CVDA and IMPA are Utah Agricultural cooperative associations organized and operated under Title 3, Utah Code Annotated.

### Plaintiffs' Response to No. 3:

That the Board of Directors of CVDA did not approve at any time a plan of merger as required by Section 3-1-31. Verified Complaint at 25.

### Defendants' Response to No. 3:

Defendants admit that the Board of Directors of CVDA did not approve at any time a plan of merger as contemplated by Utah Code Ann. Section 3-1-31. In fact, no attempt was made to consummate a merger per sections 3-1-31 through 41 of Utah Code Annotated.

Plaintiffs' No. 4:

That the Notice attached hereto as Exhibit A is a true copy of the notice used to advertise a meeting to consider the merger of CVDA into IMPA. Verified Complaint at 26.

NOTICE TO MEMBERS OF CACHE VALLEY DAIRY ASSOCIATION

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a Plan of Merger (Consolidation) under Section 3-1-30 et. seq., Utah Code Annotated, be submitted to a vote of the members of the Cache Valley Dairy Association at a special meeting of members to be held at 10:30 o' clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

The principal purpose of the meeting is to consider and vote upon the plan of Merger (Consolidation) of Cache Valley Dairy Association, Western General Dairies, Inc., Star Valley Producers, Inc., and Lake Mead Cooperative Association into Intermountain Milk Producers Association.

A summary of the Plan of Merger (Consolidation) is enclosed with this Notice. A full copy of the plan shall be furnished to any member upon request without charge. Requests should be made to Intermountain Milk Producers Association, 195 West 7200 South, Midvale, UT 84047.

Passage of this plan will require a simple majority of the members present at the meeting and voting thereon.

By order of the President as of this 25th day of November, 1985.

CACHE VALLEY DAIRY ASSOCIATION

By /s/ Wm. L. Lindley  
President

SUMMARY OF PLAN OF MERGER (CONSOLIDATION)

1. Cache Valley Dairy Association, Western General Dairies, Inc., Lake Mead Cooperative Association and Star Valley Producers, Inc., ("Consolidating Cooperatives") propose to consolidate their assets into Intermountain Milk Producers Association, formed under Title 3, Utah Code Annotated, as an agricultural cooperative

association ("IMPA").

2. The terms and conditions are: 1) the Consolidating Cooperatives will transfer to IMPA all of their assets at book value in exchange for the promise by IMPA to assume all liabilities of said cooperatives; b) All membership agreements held by such cooperatives shall be assigned to and assumed by IMPA in accordance with their terms; c) all milk base held by members shall become milk base of IMPA on a pound for pound basis subject to the same rules, regulations and agreements in effect on the day the plan is adopted; d) all equities held by members of said cooperatives shall become equities of IMPA on a dollar-for-dollar basis subject to existing rules, regulations and agreements; whatsoever, of said cooperatives shall be assumed by IMPA as though originally held by IMPA; g) All employees employed by said cooperatives as of the date of approval of the plan shall become employees of IMPA and all retirement plans, vacation accruals or other employee benefits shall be assumed by IMPA; and, h) all other provisions of the Agreement of Merger (Consolidation).

3. The surviving corporation, IMPA, shall be governed by the Utah Agricultural Cooperative Association Act.

4. No changes will be required in the Articles of Incorporation of IMPA.

5. The eighteen (18) board members of IMPA shall establish districts which shall include all areas in which IMPA members reside and shall arrange for the election of directors from said districts at the fall 1986 district meetings for seating at the annual meeting of IMPA in January 1987.

6. The Presidents and Secretaries of the respective Consolidating Cooperatives shall execute such documents as are necessary to carry out the plan.

Defendants' Response to No. 4:

Defendants admit that the notice attached to Plaintiffs' memo as Exhibit A is a true copy of the notice used to advertise a meeting to consider the transaction that had been under consideration since June to 1984. Defendants dispute Plaintiffs' characterization that the meeting was to consider a "merger" of CVDA into IMPA.

Plaintiffs' No 5:

That said notice states that the merger is to be completed in

accordance with Section 3-1-30 et seq. Verified Complaint at 27.

Defendants Response to No 5:

Defendants dispute that the notice "states that the merger is to be contemplated in accordance with Section 3-1-30 et seq." The notice does refer to Section 3-1-30. However, a summary of the plan is attached to the notice, and paragraph 2 of the summary of the plan clearly sets forth the nature of the transaction, i.e., a transfer of assets, an assignment of liabilities, etc.

Plaintiffs' No. 6:

That in clear violation of Section 3-1-33, holders of certificates of interest (Equity Holders) in CVDA of \$50.00 or more were not provided with any notice whatsoever of a merger or of any meeting or specifically of the CVDA special meeting of members held on December 16, 1985, to consider the IMPA plan of merger. Verified Complaint at 28.

Defendants' Response to No. 6:

Defendants admit that equity holders were not given notice. Defendants dispute that there is any requirement to give equity holders notice of the contemplated transaction. Defendants dispute that equity holders had any right to vote.

Plaintiffs' No. 7:

That at the said special meeting Equity Holders of \$50.00 or more were not allowed to vote on the plan of merger. Verified Complaint at 29.

Defendants' Response to No. 7:

Defendants admit that at the meeting equity holders were not

allowed to vote.

Plaintiffs' No. 8:

That at the said special meeting, no voting was allowed by delegate or proxy. Verified Complaint at 30.

Defendants' Response to No. 8:

Defendants admit that at the meeting no voting was allowed by delegate or proxy.

Plaintiffs' No. 9:

That Defendant CVDA and Defendant IMPA have refused to acknowledge dissenter's rights pursuant to Section 3-1-39. Verified Complaint at 32.

Defendants' Response to No. 9:

Defendants admit that there has been no award of dissenter's rights pursuant to Section 3-1-39. However, no one including these Plaintiffs, has asserted dissenter's rights pursuant to Section 3-1-39.

Plaintiffs' No. 10:

There have been no Articles of Merger approved of even presented to the Board of directors of CVDA nor have they been filed with the Secretary of State, nor has the Certificate of Merger been obtained. Verified Complaint at 34.

Defendants' Response to No. 10:

Defendants admit that there have been no articles of merger approved or presented to the Board of Directors of CVDA, nor filed with the Secretary of State, nor has the Certificate of Merger been obtained.

Plaintiffs' No. 11:

That all the assets and goodwill of CVDA have been purportedly assigned to IMPA. Verified Complaint at 36.

Defendants' Response to No. 11:

Defendants admit that all the assets and goodwill of CVDA have been assigned to IMPA.

Plaintiffs' No. 12:

That IMPA has appropriated CVDA's plants, personnel and labels to its own use. IMPA has treated this property in every way as its own since in or about December 1985. Verified Complaint at 37.

Defendants' Response to No. 12:

Defendants admit that all the assets and goodwill of CVDA have been assigned to IMPA, and that IMPA has treated this property in every way as property that has been assigned to IMPA. Defendants do not agree with Plaintiffs argumentative characterization that IMPA has "appropriated CVDA's assets".

## APPENDIX I

## INTERCHANGES OF FACT

Combination of Plaintiffs' and Defendants' Statements of Fact  
Taken from T. R. 52-54, 140-151, 197-199, 227-238.

### Defendants' Statement No. 1:

Defendants Intermountain Milk Producers Association ("IMPA") and Cache Valley Dairy Association ("CVDA"), are agricultural cooperatives involved in the dairy business. They are similar to numerous other cooperatives throughout the United States.

### Plaintiffs' Response No. 1:

Plaintiffs so stipulate but would add in addition to Defendants' Statement that while they are similar each is governed by the applicable state law under which each is organized and to which each owes its existence.

### Defendants' Statement No. 2:

The membership of such cooperatives is entirely made up of active producers of milk. If a person either ceases dairy production or ceases to supply milk to the cooperative, his eligibility for membership ends.

### Plaintiffs' Response No. 2:

Plaintiffs so stipulate.

### Defendants' Statement No. 3:

Dairy cooperatives exist for the purpose of assembling, processing and marketing milk and milk products. The proceeds from the sale of milk products are, for the most part, paid back to the members of the cooperative, in accordance with the Federal Milk Market Order and formulas adopted by the board of directors.

### Plaintiffs' Response No. 3:

Plaintiffs so stipulate.

Defendants' Statement No. 4:

A common way for a cooperative to obtain working capital is to retain part of the proceeds realized from marketing the dairy products. As this occurs, the members of the cooperative obtain equity interests in the cooperative based upon such contributions to working capital. These are some times referred to as "producer equities".

Plaintiffs' Response No. 4:

Plaintiffs so stipulate. Plaintiffs would suggest that rather than describe these equity certificates generically, reference should be had to the specific CVDA corporate resolutions, bylaws and articles which describe these rights precisely; to wit:

This cooperative Association is organized as a service organization for its members and not as an investment corporation. The property interests of the members of the Association in the assets of the corporation shall be determined by their respective certificates of interest or certificates of equity issued by the Association. Such certificates of interest shall be subsequent in right to the claims of all creditors of the Association. In case of dissolution or discontinuance of business of the corporation, the assets of the corporation after payment of debts shall be prorated among the members in proportion to their certificates of interest or certificate of equity as appears of record on the books of the company.

Article IV, Amended Articles of Incorporation of Cache Valley Dairy Association (1955) [Exhibit #1].

This corporation is formed to function on a cooperative basis for the mutual benefit of its members. Reasonable reserves, retains or savings, as determined by the Board of Directors, may be set aside from year to year. After setting aside such reserves, retains or savings, and after the payment of a fair rate of interest on outstanding certificates of interest

payable only in the discretion of the Board of Directors, but not in excess of 8% per year), the balance of the net earnings or savings of the Association shall be distributed on a patronage basis.....

The Association may from time to time issue to the members and patrons certificates of interest evidencing their respective interest in any fund, capital investment or other assets of the Association. The form and substance and the manner and term of payment, if any, of such certificates of interest and the time and manner of issuing the same may be determined by the Board of Directors. Such certificates of interest may be transferred only to the Association, or to such other purchasers as may be approved by the Board of Directors, and upon such terms and conditions as shall be provided for in the By-Laws.

The Board of Directors may authorize payment of interest on outstanding certificates of interest not exceeding 8% per annum, until otherwise provided by resolution of the Board of Directors.

Id. Article IX. [Exhibit #1]

The By-Laws of the Association further define the rights and interests of equity holders as follows:

Retirement of a member shall not in any manner obligate the Association to retire and pay any Certificate of Interest held by the retiring member except in the regular manner of retiring similar Certificates of Interest as may be provided by the Board of Directors.

By-Law No. 10, Compiled and Amended By-Laws of Cache Valley Dairy Association (1977) [Exhibit #2].

The Association may, from time to time, issue to the members Certificates of Interest evidencing their respective interest in any fund, capital investment or other assets of the Association. The form and substance and the manner and term of payment, if any, of such Certificates of Interest and the time and manner of issuing the same may be determined by the Board of Directors. Such Certificates of Interest may be transferred only to the Association, or to such other purchasers as may be approved by the Board of Directors, provided the Association does not desire to re-purchase the same.

. . . .  
 Upon the dissolution of the Association, all holders of Certificates of Interest shall share in the assets of the Association in proportion to their Certificates of Interest or Certificates of Equity as appears of record on the books of the company.

The Board of Directors shall have power to reclassify, increase or decrease the Certificates of Interest arising from the distribution of the net proceeds of the business operations to the revolving capital structure of the Association where Certificates of Interest are issued, based upon the reports of the Auditors, wherein books of the Association include as assets, notes, securities, or accounts receivable, that later are discovered to become uncollectible or worthless. Such Certificates may be reclassified or reduced in amount, for the purpose of redemption, prorata, as the amount of the losses bear to the total amount of Certificates issued for the year in which they were issued or the Certificates may be increased in such proportional amount in case of the collection or recovery on charged off items, the purpose being to have the Certificates redeemed at their true value, taking into consideration their true value in the light of true experience between the issuance of the certificates and the time of their redemption.

Id. By-Law No. 11. [Exhibit #2]

Nothing in this By-Law shall be construed to prevent the owners or holders of certificates of interest of Cache Valley Dairy Association from participating in the redemption of such certificates of interest in the regular course of business of the Association, in rotating their capital structure.

Id. By-Law No. 22. [Exhibit #2]

In accordance with these procedures each year the Board evaluates its financial situation and pays back or rotates the equity certificates as it deems appropriate. In doing so the Board recognizes its "duty" and "obligation to maintain the revolving capital structure" of the Association. As an example, the Resolution of March 5, 1981, is cited noting that a similar

resolution for each year could be introduced:

WHEREAS, the Association has a preexisting duty to pay patronage dividends under Section 1388 of the Internal Revenue Code, as set forth in By-Law No. 10 of the Association, and

WHEREAS, the present indebtedness and obligations of the Association, including the obligation to maintain the revolving capital structure as working capital by continuing the policy of redeeming a portion of the certificates of interest each year, have made it necessary to retain all such funds to be used as capital assets until further ordered of the Board;

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of Cache Valley Dairy Association that after deductions of depreciation in accordance with the said report and such special reserve funds as are set aside, in accordance with the previous resolutions of the Board of Directors, all of the remaining income of the Association not paid out to its members and not needed to pay the necessary expenses of the Association be set upon the books of the Association as necessary operating capital as provided by the Articles of Incorporation of the Association, and after setting aside not less than 20% of the amount that would be otherwise certificated as required by the Federal Internal Revenue Code to be paid and remitted to each of the said members on or before February 15, 1981, which when paid will reduce the value of the said certificates to not more than 80% of the face value, proportionately, and that certificates of interest for the net amount of such capital and assets be issued on a prorata 100 weight basis to the members of the Association of the amount of such net income in proportion to the milk and dairy products produced and sold by the member to the Association.

BE IT FURTHER RESOLVED that said credits be set upon the books of the Association as "Series 1980" both for items of revolving capital investment appearing in the said report and also for undistributed credits or retains and any other amounts that may hereafter be discovered to be available as assets accumulated during the said period, and that cumulative certificates of interest in form as heretofore adopted and used, evidencing the total outstanding interest of the member, be issued, signed by the President and Secretary, and delivered to the members accordingly.

ADOPTED this 5th day of March, 1981.

Resolution, Board of Directors, Cache Valley Dairy Association  
[Minutes of 3/5/81, Exhibit #3].

Defendants' Statement No. 5:

Generally speaking, where revenues in future years permit, cooperatives attempt to make payments to members representing the value of their equity interests. Such payments are made over a period of years while new amounts are retained from current revenues to replenish working capital. This process is sometimes referred to as "rotating equities". An eight to ten year cycle for such rotation is not uncommon.

Plaintiffs' Response No. 5:

Plaintiffs generally concur but would suggest in the instant matter that reference to the aforesaid Articles, By-Laws and Resolutions would be determinative of rights herein.

Defendants' Statement No. 6:

For various reasons, (such as going out of the dairy business, or joining a competing cooperative), a person's membership in a cooperative may cease. When that occurs, such former member ceases to actively participate in the cooperative, but retains an equity interest until the equity rotation cycle for the co-op has been completed. Because the co-op's ability to retire equities is dependent upon various economic factors, as well as the decisions of the cooperative's board of directors, the former member has no guarantee that his equity interest will ever be fully retired.

Plaintiffs' Response No. 6:

Plaintiffs generally concur but again would state that the rights of equity holders herein are specifically described in the cited Articles, By-Laws and Resolutions of the Association. Further, that while an equity certificate holder has no guarantee of repayment there is an obligation of fairness owed to him and the corporation and directors have a fiduciary duty toward such a holder. To state that an equity holder's repayment may be affected by financial reverses suffered by the Association, does not infer that such a holder has no rights, nor that the equity certificate is valueless.

Derendants' Statement No. 7:

During a several year period prior to 1984, various discussions and negotiations took place involving four different dairy-oriented agricultural cooperatives, ("CVDA"), Star Valley Cheese Cooperative, and Lake Mead Cooperative Association. The discussions and negotiations concerned the joining of the assets and resources of such cooperatives to work together in one larger cooperative for assembling, processing and marketing milk and milk products. As part of such discussions, the potential benefits which might be realized by Cache Valley Dairy Association were considered. Among them were the following:

a. The Cache Valley Dairy Association would gain immediate access to a Grade A market, which it did not have at that time. This would enable the members of Cache Valley Dairy Association, who desired to do so, to become Grade A milk producers and receive higher prices for their milk.

b. The cheese plants owned by Cache Valley Dairy Association, would secure commitments for a greater volume of milk, potentially allowing such plants to operate at greater efficiency.

c. Cache Valley Dairy Association would also realize the other benefits relating to "economies of scale" due to its membership in a larger organization with greater bargaining power, broader markets, and common management.

d. By unifying with several of its competitors, Cache Valley Dairy Association would enjoy the benefits of reduced competition for the procurement of raw milk supplies.

e. Cache Valley Dairy Association's liabilities and debts would be assumed by the larger organization.

Plaintiffs' Response No. 7:

Plaintiffs concur that CVD entered into various negotiations and discussions with other agricultural cooperatives relative to joining together. As a part thereof various advantages and disadvantages were discussed. Plaintiffs do not agree that Defendants' Fact No. 7 sets out any of the disadvantages considered.

Defendants' Statement No. 8:

In return, the new organization would realize the benefit of Cache Valley Dairy Association's assets, including its supply of milk, cheese plants, and its cutting and wrapping facility.

Plaintiff's Response No. 8:

Plaintiffs concur that CVD entered into various negotiations and

discussions with other agricultural cooperatives relative to joining together. As a part thereof various advantages and disadvantages were discussed. Plaintiffs do not agree that Derendants' Fact No. 8 sets out all of the advantages considered.

Defendants' Statement No. 9:

The negotiations among the four aforesaid cooperatives resulted in an agreement which was formalized in June of 1984 by a letter of intent among the four cooperatives, which went into effect on August 1, 1984. Such agreement as well as subsequent agreements, eventually led to the transfer of assets and liabilities, over a period of time, by the four cooperatives to Intermountain Milk Producers Association, the new larger cooperative. The transition process concluded on August 1, 1986.

Plaintiffs' Response No. 9:

Plaintiffs stipulate that CVD and three other cooperatives executed a Letter of Intent in June of 1984. A true copy of the same is attached as Exhibit #8. That Letter does not authorize in any way the combination of assets which subsequently occurred. It specifically states in relevant part:

6. The ultimate goal of the Parties is to consolidate their operations into IMPA, however, this consolidation will take place over a period of time in phases which will not be completely specified at this time but will require further Board and/or membership approval of the parties as may be required by law at that time.

. . .

19. At the time the consolidation is accomplished, all members of the parties will terminate their membership in the parties and will be given membership in IMPA. All remaining assets of the

Parties will be transferred to IMPA at book value and all remaining debts will be assumed by IMPA. All employees will be transferred to IMPA, subject to any labor contracts which may then exist. Producer equities held by the Parties will be assumed by IMPA and will be rotated on a uniform basis.

. . .

21. The Parties hereto will negotiate in good faith definitive agreements and documents for the purpose of implementing IMPA. In the event definitive agreements and documents are not entered into by the Commencement Date [August 1, 1984], the matters set forth in this letter shall be terminated and shall be null and void.

Letter of Intent, dated June 15, 1984. The record is benefit of any "definitive agreement" or "further Board and/or membership approval as may be required by law". Id. Furthermore, by its own wording the Letter expired on August 1, 1984. Id.

Defendants' Statement No. 10:

There were several meetings of CVDA's board of directors where the Letter of Intent was considered. The Letter was approved by the board of directors at each such meeting with no more than 5 of the 21 member board voting against it.

Plaintiffs' Response No. 10:

Plaintiffs so stipulate.

Defendants' Statement No. 11:

At such meetings several of the plaintiffs voted in favor of the Letter of Intent and plaintiffs, Gene Brice, Thedford Roper and Gordon Zilles voted consistently in favor of it.

Plaintiffs' Response No. 11:

Plaintiffs so stipulate.

Defendants' Statement No. 12:

from the period beginning in June of 1984, when the Letter of Intent was executed until August of 1986 when the transfer of assets was completed, none of the seven individual plaintiffs took affirmative action to formally notify CVDA or IMPA that he intended to prevent the transfer of assets from taking place, or otherwise legally contest the transaction.

Plaintiffs' Response No. 12:

The method by which Defendants attempted to combine the cooperatives was never approved nor was it even properly disclosed. The method was evidently determined solely by IMPA and legal counsel. Furthermore Plaintiffs did rely on the legal advice of Defendant Wilson that the method of combination was legal and that all the requisite statutory requirements were being followed. Instructive in this regard are the minutes of IMPA which include this Resolution adopted just three days after the Special Meeting of members of Cache Valley Dairy Association.

WHEREAS, the members of Cache Valley Dairy Association and Western General Dairies Inc. voted in special membership meetings held December 16, 1985 to approve a plan of merger (consolidation) with IMPA or in the alternative to authorize the assets of said Cooperatives to be conveyed and membership agreements to be assigned in exchange for the assumption of debt and producer equities; and

WHEREAS, the plan of merger (consolidation) allowed for abandonment thereof pursuant to statute; and whereas the board of IMPA has made a preliminary determination that said plan should be abandoned.

NOW THEREFORE, it is hereby resolved that the plan of merger (consolidation) be abandoned and that the alternative procedure be followed with respect to the conveyance of assets, assignment of membership agreements and assumption of debts and equities on such a schedule and at such a time as shall meet the

objectives of IMPA.

The foregoing Resolution was adopted by the board of IMPA on December 19, 1985.

Resolution in the Minutes of IMPA [Exhibit #6].

This IMPA Resolution pursuant to "statute" abandons the plan of merger (consolidation) approved by vote. This is an obvious, if misguided, reference to the last paragraph of Section 3-1-35. IMPA purports to make the abandonment and select an alternative never approved by the CVD Board, Members or Equity Holders. No Notice of this change was ever given to CVD, Plaintiffs or the general membership. Furthermore, there was never any meeting of the CVD Board or Directors subsequent to its decision to notify the members of and conduct the Special Meeting held December 16, 1985. [Exhibit #3].

Defendants' Statement No. 13:

It was not until February of 1987, six months after the transfer of assets was completed and 2 1/2 years after the letter of intent was executed, that IMPA became aware that some of the former CVDA directors intended to legally contest the transaction.

Plaintiffs' Response No. 13:

Defendant Wilson wrote a formal legal response to legal challenges on November 19, 1986. See Exhibit #9. Three Special Meetings of the CVD Board were convened because a number of board members questioned the legality of the combination. See Exhibit #3, Notice and a Memorandum prepared at the request of Plaintiffs and submitted therein. Defendant Wilson appeared at one of such

meetings and threatened personal legal action against any dissidents and alternatively promised personal indemnification if the directors went along Id.

Defendants' Statement No. 14:

On December 16, 1985, at a special meeting of members of CVDA was held, at which a vote of the members was taken on the transfer of assets from Cache Valley Dairy Association to IMPA.

Plaintiffs' Response No. 14:

Indeed a Special Meeting was held to consider the plan of merger (consolidation) pursuant to Section 3-1-30 which was later abandoned by IMPA. Equity holders were not allowed to vote nor were proxies or voting by representative allowed. There was no notice, board approval or or proper voting on a "transfer of assets". The minutes taken indicate the members present approved "a complete merger." Exhibit #3; See also Notice and Summary attached, Exhibit #4.

Defendants' Statement No. 15:

Included among the non-producer equity holders of the CVDA at the time of the membership vote on December 16, 1985, were individuals who were producing milk for other co-ops or concerns which were in direct competition with the CVDA. Some equities of CVDA were owned by institutions or individuals which were not dairy producers on said date.

Plaintiffs' Response No. 15:

Plaintiffs so stipulate.

Defendants' Statement No. 16:

As of August 1, 1986, all assets owned by Cache Valley Dairy Association as well as the assets of the other three cooperatives had been transferred to IMPA and all liabilities of every kind, whether known or unknown, had been assumed by IMPA. Producer Membership Agreements had been assigned to IMPA as of said date and the producer equities then standing on the books of Cache Valley Dairy and the others had been assumed by IMPA.

Plaintiffs' Response No. 16:

Evidently it was on this or an earlier date that the purported conveyances were made. This was done without membership or board approval or even knowledge thereof.

Defendants' Statement No. 17:

On or about March 28, 1986, IMPA caused certain producer equities standing in the name of former members of Cache Valley Dairy to be redeemed in the amount of \$1,173,989 in order to reduce the outstanding equities of Cache Valley Dairy from ten years to eight years in order to be on the same equity rotation as other producers assigned to IMPA.

Plaintiffs' Response No. 17:

Plaintiffs so stipulate.

Defendants' Statement No. 18:

The principal borrowing of Cache Valley Dairy from the Sacramento Bank for Cooperatives has been consolidated into an \$18,000,000 line of credit from the Sacramento Bank for Cooperatives to IMPA and former Cache Valley Dairy assets have been pledged by IMPA as security for such loan.

Plaintiffs' Response No. 18:

Plaintiffs stipulate only that IMPA and the Sacramento Bank for Cooperatives have purported to do such things. Plaintiffs deny the legal effectiveness thereof.

Defendants' Statement No. 19:

All cash accounts from all functions of Cache Valley have been intermingled into common accounts of IMPA.

Plaintiffs' Response No. 19:

Plaintiffs so stipulate.

Defendants' Statement No. 20:

Since approximately August 1, 1984, the four cooperatives who formed IMPA, including Cache Valley Dairy, have been operating under a Letter of Intent whereby the parties agreed to "blend" their "bottom lines" in order that losses from one company might be offset as against gains in another company. Consolidated financial statements were prepared and joint tax returns filed for fiscal years ending July 31, 1985 and 1986.

Plaintiffs' Response No. 20:

Plaintiffs stipulate only that the Letter of Intent, Exhibit #8, speaks for itself.

Defendants' Statement No. 21:

Legal and auditing expenses have been paid by IMPA on behalf of Cache Valley Dairy, including substantial legal expenses to defend a case against Cache Valley Dairy filed by Cheryl Vause.

Plaintiffs' Response No. 21:

Plaintiffs acknowledge that expenses have been allocated between

IMPA and CVD, but further allege that CVD's profits have been used to substantially subsidize IMPA. Plaintiffs acknowledge that IMPA has both controlled and mishandled the defense of CVD in a legal action brought by Vause.

Defendants' Statement No. 22:

Approximately 82 former members of Cache Valley Dairy have converted from Grade B to Grade A status and have received payment for milk based upon Grade A pricing. They also were allocated IMPA base or quota which represents their proportionate share of the Grade A milk market. These producers did not have access to a Grade A market but were able to convert from Grade B to Grade A due to the established market for Grade A products which was provided through IMPA. This has had the effect of producing more revenue for those 82 producers, as a group, and diminishing the revenue for existing Grade A producers of IMPA, as a group, through the adjustments of the Federal Milk Marketing Order blend price, as a result of a reduction in market utilization percentage. Producers which converted from Grade B to Grade A were required to expend considerable funds to upgrade their facilities which could not be recouped if the Grade A market of IMPA were no longer available to these Grade A producers.

Plaintiffs' Response No. 22:

Plaintiffs stipulate only that some of its five hundred plus producers have had some portion of their milk paid at Grade A Pricing. Plaintiffs deny that Grade A markets were not otherwise available to CVD producers.

Defendants' Statement No. 23:

The producer payroll and all of its components, to include quality program, cheese yield formula, milk market settlement and others, are all centrally computed and paid by IMPA. It would not be feasible to separate the former Cache Valley producers from IMPA for purposes of producer payroll due to the difficulty in obtaining funds from producers which would have been overpaid.

Plaintiffs' Response No. 23:

Plaintiffs deny that separation is not feasible. Plaintiffs believe separation is practical, efficient and in the best financial interest of CVD producers.

Defendants' Statement No. 24:

The amount of milk production in IMPA's operating area has been reduced through the dairy termination program and through other causes. This reduction has an effect on every cheese or surplus milk plant in terms of operating efficiency. Therefore, the milk available for processing in the former Cache Valley plants at Amaiga and Beaver has been greatly diminished and it is estimated that only 340,000 pounds daily would have been available during the month of February, which would have permitted the Amaiga plant to run at only 25-30% efficiency even with the Beaver plant closed. The Amaiga plant cannot be operated profitably at this level of efficiency. The overhead of the closed Beaver plant would also have to be covered. These losses would have to be born by producers.

Plaintiffs' Response No. 24:

Plaintiffs disagree. Plaintiffs note that the cheese division of IMPA, which is nothing more or less than CVD, has and continues to make a profit subsidizing the fluid milk division.

Defendants' Statement No. 25:

All of the milk produced by producer members of Cache Valley has been collected and transported by IMPA since approximately August 1, 1984. Farm pick-up routes have been adjusted to achieve economies and equipment has been modified, reassigned, salvaged or sold.

Plaintiffs' Response No. 25:

Plaintiffs disagree. CVD milk is hauled primarily in trucks owned by CVD. Further there are few realized economics of scale by IMPA to date.

Defendants' Statement No. 26:

Field men have been reassigned since August 1, 1984, and have been reduced from 11 to 8 in number during that time.

Plaintiffs' Response No. 26:

Plaintiffs believe this fact is but irrelevant.

Defendants' Statement No. 27:

Over the period of time since August, 1984, insurance has been centrally purchased by IMPA for all fleet, liability, casualty, property and workmen's compensation and old policies have been cancelled. The fleet insurance provided through IMPA resulted in substantial savings with respect to the fleet of vehicles formerly owned by Cache Valley Dairy.

Plaintiffs' Response No. 27:

Plaintiffs disagree and further state that IMPA is losing money.

Defendants' Statement No. 28:

Substantial capital purchases and leases have been made to provide for increases to the truck fleet, plant equipment, other plant improvements and computer capability, all in the name of IMPA. This also includes the construction of a \$10 million milk plant in Salt Lake County, the financing of which was arranged by IMPA. This plant was constructed to process a volume of milk produced by those producers assigned to IMPA.

Defendants' Statement No. 29:

Computers have been reprogrammed and expanded to accommodate the expanded business created by the assignment of assets to IMPA and the assumption of liabilities of IMPA.

Defendants' Statement No. 30:

Since August 1, 1984, when the Letter of Intent became effective, the central office facility of IMPA has been sold and new quarters have been leased for a period of six (6) years in the name of IMPA to accommodate the increased office needs.

Defendants' Statement No. 31:

Credit arrangements with customers, discounts, terms of sale and other matters relating to the sale of products have been negotiated in the name of IMPA to accommodate the increased office needs.

Defendants' Statement No. 32:

All employee payroll and records relating to employment have been transferred to IMPA and are administered centrally by IMPA and

its computer. The availability of the greater computer capacity of IMPA has obviated the necessity of replacing a computer at Cache Valley Dairy.

Plaintiffs' Response No. 28 through 32:

All of these facts go to reliance of IMPA on the combination. All of the facts cited, however, refer to activities of IMPA before even the purported combination was approved or presented. The Letter of Intent provides no authority to obligate CVD to these involvements.

Defendants' Statement No. 33:

The profit sharing plan of Cache Valley Dairy has been terminated and all proceeds have been paid out. Beginning August 1, 1986, the former Cache Valley Dairy employees were extended a pension plan under the sponsorship of IMPA. No pension or profit sharing plan now exists for Cache Valley Dairy.

Plaintiffs' Response No. 33:

Plaintiffs so stipulate.

Defendants' Statement No. 34:

Since August 1, 1984, significant changes have occurred in management personnel. Personnel have been transferred from Cache Valley Dairy to IMPA and many employees have been terminated with some hired in their place.

Plaintiffs' Response No. 34:

Plaintiffs so stipulate.

Defendants' Statement No. 35:

The corporate entities of the four cooperatives which formed IMPA

possess no members, no assets, no liabilities, or any purpose for existing. These corporations are in varying stages of being dissolved.

Plaintiffs' Response No. 35:

Plaintiffs deny. This fact asserts a legal conclusion which is disputed.

Defendants' Statement No. 36:

Due to the excess plant capacity available in the IMPA system after transfer of all assets to IMPA, certain plants have been, or are in the process of being, closed or modified, which include the Cedar City plant, the Murray plant, the Ogden plant, and the Idaho Falls plant. This has substantially reduced the capability of the remaining plants to process and handle available milk if the former Cache Valley plants were not available. With the closure of the Ogden cheese plant, there is no Utah cheese plant capability left in IMPA without the former Cache Valley plant. Equipment has been removed from plants and sold off or placed in other plants at considerable expense.

Defendants' Statement No. 37:

The cheese cutting and wrapping operations formerly owned by Cache Valley Dairy have been utilized to handle cheese production not only from plants formerly associated with Cache Valley but from cheese available to IMPA from other sources. The reliance upon cheese cutting and wrapping capability is extremely important to IMPA and its future business.

Defendants' Statement No. 38:

IMPA has committed a full supply of raw milk to certain customers and substantial supply to other customers. It also has committed to operate its remaining plants at acceptable efficiency. These commitments were made in reliance upon the availability of producer milk to IMPA from all of the members assigned to it. A withdrawal of a substantial amount of milk would have a tremendous effect on the ability of IMPA to furnish raw milk to handlers, to operate its plants at a satisfactory level and to provide a supply balancing function for the market.

Plaintiffs' Response No. 36 through 38:

Plaintiffs deny responsibility for the same and assert Defendant IMPA and the individual Defendants are responsible therefore. Perhaps Defendant IMPA should reconsider its current activities.

Defendants' Statement No. 39:

IMPA is operating under a Letter of Intent with Mountain Empire Dairymen's Association ("MEDA") and Western Dairymen Cooperative, Inc. ("WDCI") with an intent to merger or otherwise consolidate assets. These parties have entered into a certain agreement whereby IMPA would operate a Twin Falls cheese plant for MEDA, whereby MEDA and IMPA would half milk for IMPA, certain employees would handle all of the coordination of field work and many other functions. IMPA relies on these arrangements with MEDA and WDCI for its continued successful operation. The loss of the former members and facilities of Cache Valley Dairy Association from IMPA could jeopardize such arrangements with MEDA and WDCI.

Plaintiffs' Response No. 39:

This fact sounds as if IMPA is going about a new combination with yet another cooperative in the same manner as it used with CVD. It may be true that recognizing CVD is not a part of IMPA could create difficulties. Just the same from the perspective of Plaintiffs, CVD continuing with IMPA jeopardizes the financial position of CVD and its members and the equity holders ownership interest therein.